CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 36 **JULY 31, 2002** **NO. 31**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

Please visit the U.S. Customs Web at:
http://www.customs.gov

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

19 CFR Parts 132 and 163

(T.D. 02–36)

RIN 1515–AD09

ELIMINATION OF THE TARIFF-RATE QUOTAS ON IMPORTED LAMB MEAT

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: The tariff-rate quota imposed on imported lamb meat products has been eliminated by Presidential Proclamation 7502 of November 14, 2001. Accordingly, this document amends the Customs Regulations by removing the regulation requiring that lamb meat subject to the tariff-rate quota be covered by an export certificate in order to obtain the in-quota rate of duty.

EFFECTIVE DATE: July 16, 2002.

FOR FURTHER INFORMATION CONTACT: Thomas Fitzpatrick, Office of Field Operations, 202–927–5385.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Presidential Proclamation 7208 of July 7, 1999, as modified by Presidential Proclamation 7214 of July 30, 1999, imposed a temporary tariff-rate quota (TRQ) effective July 22, 1999, on lamb meat imports provided for in subheadings 0204.10.00, 0204.22.20, 0204.23.20, 0204.30.00, 0204.42.20, and 0204.43.20, Harmonized Tariff Schedule of the United States (HTSUS), in order to facilitate the domestic industry's adjustment to import competition. Under Presidential Proclamation 7214, the United States Trade Representative (USTR) was authorized to administer the TRQ on the lamb meat.

Pursuant to Presidential Proclamations 7208 and 7214 and the implementing regulations of the USTR (15 CFR 2014), the United States Customs Service issued § 132.16 of the Customs Regulations (19 CFR

132.16) which required that lamb meat subject to the TRQ be covered under certain circumstances by an export certificate in order to obtain the in-quota rate of duty. Also, an appropriate reference to the export-certificate requirement of § 132.16 was included in the Appendix to Part 163, Customs Regulations (19 CFR 163, Appendix), which lists those records that are required for the entry of imported merchandise. (See Customs interim and final rules in this matter published in the Federal Register on December 2, 1999, and December 13, 2000, respectively (64 FR 67482 and 65 FR 77816).)

The TRQ imposed on the lamb meat has now been eliminated by Presidential Proclamation 7502 of November 14, 2001. With the elimination of this TRQ, there is therefore no longer any need for the regulation requiring that an export certificate cover the lamb meat in order to entitle the lamb meat to the in-quota rate of duty under the TRQ. Accordingly, § 132.16 is being removed from the Customs Regulations as well as the reference to § 132.16 in the Appendix to Part 163.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because these amendments merely reflect Presidential Proclamation 7502 of November 14, 2001, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary, and for the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. These amendments do not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Drafting Information

The principal author of this document was Janet L. Johnson, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 132

Agriculture and agricultural products, Customs duties and inspection, Quotas, Reporting and recordkeeping requirements.

19 CFR Part 163

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Amendments to the Regulations

Parts 132 and 163, Customs Regulations (19 CFR Parts 132 and 163), are amended as set forth below.

PART 132—QUOTAS

1. The general authority citation for Part 132 continues to read as follows and the relevant specific authority citation for § 132.16 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States (HTSUS)), 1623, 1624.

§§ 132.15, 132.17, and 132.18 also issued under 19 U.S.C. 1202 (additional U.S. Note 3 to Chapter 2, HTSUS; additional U.S. Note 8 to Chapter 17, HTSUS; and subchapter II of Chapter 99, HTSUS, respectively), 1484, 1508.

1. Part 132 is amended by removing and reserving § 132.16.

PART 163—RECORDKEEPING

1. The authority citation for Part 163 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1484, 1508, 1509, 1510, 1624.

2. In the Appendix to part 163, under heading IV, the list of documents/records or information required for entry of special categories of merchandise is amended by removing the listing "§§ 132.15 through 132.17 Export certificates, respectively, for beef, lamb meat, or sugar-containing products subject to tariff-rate quota." and by adding the following listing in its place:

APPENDIX TO PART 163—INTERIM (a)(1)(A) LIST

* * * * * * *

IV. * * *

§§ 132.15, 132.17 Export certificates, respectively, for beef or sugar-containing products subject to tariff-rate quota.

* * * * * * *

ROBERT C. BONNER,
Commissioner of Customs.

Approved: July 10, 2002.

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 16, 2002 (67 FR 46588)]

19 CFR Part 12

(T.D. 02–37)

RIN 1515–AC86

IMPORT RESTRICTIONS IMPOSED ON PRE-CLASSICAL AND CLASSICAL ARCHAEOLOGICAL MATERIAL ORIGINATING IN CYPRUS

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect the imposition of import restrictions on certain archaeological material originating in Cyprus and representing the pre-Classical and Classical periods of its cultural heritage, ranging in date from approximately the 8th millennium B.C. to approximately 330 A.D. These restrictions are being imposed pursuant to an agreement between the United States and the Republic of Cyprus that has been entered into under the authority of the Convention on Cultural Property Implementation Act in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The document amends the Customs Regulations by adding Cyprus to the list of countries for which an agreement has been entered into for imposing import restrictions. The document also contains the Designated List of Archaeological Material that describes the types of articles to which the restrictions apply.

EFFECTIVE DATE: July 19, 2002.

FOR FURTHER INFORMATION CONTACT: (Legal Aspects) Joseph Howard, Intellectual Property Rights Branch (202) 572–8701; (Operational Aspects) Al Morawski, Trade Operations (202) 927–0402.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably makes them targets of theft, encourages clandestine looting of archaeological sites, and results in their illegal export and import.

The U.S. shares in the international concern for the need to protect endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been

pillage has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of museum, archaeological, and scholarly communities, was recognized by the President and Congress. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in deliberations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub.L. 97–446, 19 U.S.C. 2601 *et seq.*) ("the Act"). This was done to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance to the nations from where they originate and to achieving greater international understanding of mankind's common heritage.

During the past several years, import restrictions have been imposed on archaeological and ethnological artifacts of a number of signatory nations. These restrictions have been imposed as a result of requests for protection received from those nations as well as pursuant to bilateral agreements between the United States and other countries. More information on import restrictions can be found on the International Cultural Property Protection web site (http://exchanges.state.gov/culprop).

Import restrictions are now being imposed on certain archaeological material of Cyprus representing the pre-Classical and Classical periods of its cultural heritage as the result of a bilateral agreement entered into between the United States and the Republic of Cyprus. This agreement was entered into on July 16, 2002, pursuant to the provisions of 19 U.S.C. 2602. Accordingly, § 12.104g(a) of the Customs Regulations is being amended to indicate that restrictions have been imposed pursuant to the agreement between the United States and Cyprus. This document amends the regulations by imposing import restrictions on certain archaeological material from Cyprus as described below.

It is noted that emergency import restrictions on Byzantine Ecclesiastical and Ritual Ethnological Material from Cyprus were previously imposed and are still in effect. (See T.D. 99–35, published in the Federal Register (64 FR 17529) on April 12, 1999.) These emergency import restrictions are separate and independent from the restrictions published in this document.

Material Encompassed in Import Restrictions

In reaching the decision to recommend protection for the cultural patrimony of Cyprus, the Associate Director for Educational and Cultural Affairs of the former United States Information Agency determined that, pursuant to the requirements of the Act, the cultural patrimony of Cyprus is in jeopardy from the pillage of archaeological materials which represent its pre-Classical and Classical heritage. Dating from approxi-

mately the 8th millennium B.C. to approximately 330 A.D., categories of restricted artifacts include ceramic vessels, sculpture, and inscriptions; stone vessels, sculpture, architectural elements, seals, amulets, inscriptions, stelae, and mosaics; metal vessels, stands sculpture, and personal objects. These materials are of cultural significance because Cypriot culture is among the oldest in the Mediterranean. While Cypriot culture derives from interactions with neighboring societies, it is uniquely Cypriotic in character and represents the history and development of the island about which important information continues to be found through *in situ* archaeological research.

The restrictions imposed in this document apply to objects from throughout the island of Cyprus.

DESIGNATED LIST

The bilateral agreement between Cyprus and the United States covers the categories of artifacts described in a Designated List of Archaeological Material from Cyprus, which is set forth below. Importation of articles on this list is restricted unless the articles are accompanied by an appropriate export certificate issued by the Government of the Republic of Cyprus or documentation demonstrating that the articles left the country of origin prior to the effective date of the import restriction.

ARCHAEOLOGICAL MATERIAL FROM CYPRUS REPRESENTING PRE-CLASSICAL AND CLASSICAL PERIODS RANGING IN DATE FROM APPROXIMATELY THE 8th MILLENNIUM B.C. TO APPROXIMATELY 330 A.D.

I. CERAMIC

A. Vessels

1. Neolithic and Chalcolithic (c. 7500–2300 B.C.)—Bowls and jars, including spouted vessels. Varieties include Combed ware, Black Lustrous ware, Red Lustrous ware, and Red-on-White painted ware. Approximately 10–24 cm in height.

2. Early Bronze Age (c. 2300–1850 B.C.)—Forms are hand-made and include bowls, jugs, juglets, jars, and specialized forms, such as askoi, pyxides, gourd-shape, multiple-body vessels, and vessels with figurines attached. Cut-away spouts, multiple spouts, basket handles, and round bases commonly occur. Incised, punctured, molded, and applied ornament, as well as polishing and slip, are included in the range of decorative techniques. Approximately 13–60 cm in height.

3. Middle Bronze Age (c. 1850–1550 B.C.)—Forms are hand-made and include bowls, jugs, juglets, jars, zoomorphic askoi, bottles, amphorae, and amphoriskoi. Some have multiple spouts and basket or ribbon handles. Decorative techniques include red and brown paint, incised or applied decoration, and polishing. Varieties include Red Polished ware, White Painted ware, Black Slip ware, Red Slip ware, and Red-on-Black ware. Approximately 4–25 cm in height.

4. Late Bronze Age (c. 1550–1050 B.C.)—Forms include bowls, jars, jugs and juglets, tankards, rhyta, bottles, kraters, alabastra, stemmed cups, cups, stirrup jars, amphorae, and amphoriskoi. A wide variety of

spouts, handles, and bases are common. Zoomorphic vessels also occur. Decorative techniques include painted design in red or brown, polishing, and punctured or incised decoration. Varieties include White Slip, Base Ring ware, White Shaved ware, Red Lustrous ware, Bichrome Wheel-made ware, and Proto-White Painted ware. Some examples of local or imported Mycenaean Late Helladic III have also been found. Approximately 5–50 cm in height.

5. Cypro-Geometric I–III (c. 1050–750 B.C.)—Forms include bowls, jugs, juglets, jars, cups, skyphoi, amphorae, amphoriskos, and tripods. A variety of spouts, handles and base forms are used. Decorative techniques include paint in dark brown and red, ribbing, polish, and applied projections. Varieties include White Painted I–II wares, Black Slip I–II wares, Bichrome II–III wares, and Black-on-Red ware. Approximately 7–30 cm in height.

6. Cypro-Archaic I–II (c. 750–475 B.C.)—Forms include bowls, plates, jugs and juglets, cups, kraters, amphoriskoi, oinochoe, and amphorae. Many of the forms are painted with bands, lines, concentric circles, and other geometric and floral patterns. Animal designs occur in the Free Field style. Molded decoration in the form of female figurines may also be applied. Red and dark brown paint is used on Bichrome ware. Black paint on a red polished surface is common on Black-on-Red ware. Other varieties include Bichrome Red, Polychrome Red, and Plain White. Approximately 12–45 cm in height.

7. Cypro-Classical I–II (c. 475–325 B.C.)—Forms include bowls, shallow dishes, jugs and juglets, oinochoai, and amphorae. The use of painted decoration in red and brown, as well as blue/green and black continues. Some vessels have molded female figurines applied. Decorative designs include floral and geometric patterns. Burnishing also occurs. Varieties include Polychrome Red, Black-on-Red, Polychrome Red, Stroke Burnished, and White Painted wares. Approximately 6–40 cm in height.

8. Hellenistic (c. 325 B.C.–50 B.C.)—Forms include bowls, dishes, cups, unguentaria, jugs and juglets, pyxides, and amphorae. Most of the ceramic vessels of the period are undecorated. Those that are decorated use red, brown, or white paint in simple geometric patterns. Ribbing is also a common decorative technique. Some floral patterns are also used. Varieties include Glazed Painted ware and Glazed ware. Imports include Megarian bowls. Approximately 5–25 cm in height.

9. Roman (c. 50 B.C.–330 A.D.)—Forms include bowls, dishes, cups, jugs and juglets, unguentaria, amphora, and cooking pots. Decorative techniques include incision, embossing, molded decoration, grooved decoration, and paint. Varieties include Terra Sigillata and Glazed and Green Glazed wares. Approximately 5–55 cm in height.

B. Sculpture

1. Terracotta Figurines (small statuettes)

a) Neolithic to Late Bronze Age (c. 7500–1050 B.C.)—Figurines are small, hand-made, and schematic in form. Most represent female fig-

ures, often standing and sometimes seated and giving birth or cradling an infant. Features and attributes are marked with incisions or paint. Figurines occur in Red-on-White ware, Red Polished ware, Red-Drab Polished ware, and Base Ring ware. Approximately 10–25 cm in height.

b) Cypro-Geometric to Cypro-Archaic (c. 1050–475 B.C.)—Figurines show a greater diversity of form than earlier figurines. Female figurines are still common, but forms also include male horse-and-rider figurines; warrior figures; animals such as birds, bulls and pigs; tubular figurines; boat models; and human masks. In the Cypro-Archaic period, terra cotta models illustrate a variety of daily activities, including the process of making pottery and grinding grain. Other examples include musicians and men in chariots. Approximately 7–19 cm in height.

c) Cypro-Classical to Roman (c. 475 B.C.–330 A.D.)—Figurines mirror the classical tradition of Greece and Roman. Types include draped women, nude youths, and winged figures. Approximately 9–20 cm in height.

2. Large Scale Terracotta Figurines—Dating to the Cypro-Archaic period (c. 750–475 B.C.), full figures about half life-size, are commonly found in sanctuaries. Illustrated examples include the head of a woman decorated with rosettes and a bearded male with spiral-decorated helmet. Approximately 50–150 cm in height.

3. Funerary Statuettes—Dating to the Cypro-Classical period (c. 475–325 B.C.), these illustrate both male and female figures draped, often seated, as expressions of mourning. Approximately 25–50 cm in height.

C. Inscriptions

Writing on clay is restricted to the Late Bronze Age (c. 1550–1050 B.C.). These occur on clay tablets, weights, and clay balls. Approximately 2–7 cm in height.

II. STONE

A. Vessels

Ground stone vessels occur from the Neolithic to the Hellenistic period (c. 7500–50 B.C.). Early vessels are from local hard stone. Most are bowl-shaped; some are trough-shaped with spouts and handles. Neolithic vessels often have incised or perforated decoration. Late Bronze Age vessels include amphoriskoi and kraters with handles. Sometimes these have incised decoration. Alabaster was also used for stone vessels in the Late Bronze Age and Hellenistic period. In the latter period, stone vessels are produced in the same shapes as ceramic vessels: amphorae, unguentaria, etc. Approximately 10–30 cm in height.

B. Sculpture

1. Neolithic to Chalcolithic (c. 7500–2300 B.C.)—Forms include small scale human heads, fiddle-shaped human figures, steatopygous female figures, cruciform idols with incised decoration, and animal figures. Andesite and limestone are commonly used in these periods. Approximately 5–30 cm in height.

2. Cypro-Classical (c. 475–325 B.C.)—Small scale to life-size human figures, whole and fragments, in limestone and marble, are similar to the Classical tradition in local styles. Examples include the limestone head of a youth in Neo-Cypriote style, votive female figures in Proto-Cypriot style, a kouros in Archaic Greek style, statues and statuettes representing Classical gods such as Zeus and Aphrodite, as well as portrait heads of the Greek and Roman periods. Approximately 10–200 cm in height.

C. Architectural Elements

Sculpted stone building elements occur from the 5th century B.C. through the 3rd century A.D. These include columns and column capitals, relief decoration, chancel panels, window frames, revetments, offering tables, coats of arms, and gargoyles.

D. Seals

Dating from the Neolithic (7500 B.C.) through 3rd century A.D., conical seals, scarabs, cylinder seals, and bread stamps are incised with geometric decoration, pictoral scenes, and inscriptions. Approximately 2–12 cm. in height.

E. Amulets and Pendants

Dating to the Chalcolithic period, these pendants are made of picrolite and are oval or rectangular in form. Approximately 4–5 cm in length.

F. Inscriptions

Inscribed stone materials date from the 6th century B.C. through the 3rd century A.D. During the Cypro-Classical period, funerary stelae, and votive plaques were inscribed. From the 1st to the 3rd century A.D. funerary plaques, mosaic floors, and building plaques were inscribed.

G. Funerary Stelae (uninscribed)

Funerary stelae date from the 6th century B.C. to the end of the Hellenistic period (c. 50 B.C.). Marble and other stone sculptural monuments have relief decoration of animals or human figures seated or standing. Stone coffins also have relief decoration. Approximately 50–155 cm in height.

H. Floor Mosaics

Floor mosaics date as early as the 4th century B.C. in domestic and public contexts and continue to be produced through the 3rd century A.D. Examples include the mosaics at Nea Paphos, Kourion, and Kouklia.

III. METAL

A. Copper/Bronze

1. Vessels—Dating from the Bronze Age (c. 2300 B.C.) through the 3rd century A.D., bronze vessel forms include bowls, cups, amphorae, jugs, juglets, pyxides, dippers, lamp stands, dishes, and plates. Approximately 4–30 cm in height.

2. Bronze Stands—Dating from the Late Bronze Age (c. 1550 B.C.) through the end of the Classical period (c. 325 B.C.), are bronze stands with animal decoration.

3. Sculpture—Dating from the Late Bronze Age (c. 1550) to the end of the Hellenistic period (c. 50 B.C.), small figural sculpture includes human forms with attached attributes such as spears or goblets, animal figures, animal- and vessel-shaped weights, and Classical representations of gods and mythological figures. Approximately 5–25 cm in height.

4. Personal Objects—Dating from the Early Bronze Age (c. 2300 B.C.) to the end of the Roman period (330 A.D.), forms include toggle pins, straight pins, fibulae, and mirrors.

B. Silver

1. Vessels—Dating from the Bronze Age (c. 2300 B.C.) through the end of the Roman period (330 A.D.), forms include bowls, dishes, coffee services, and ceremonial objects such as incense burners. These are often decorated with molded or incised geometric motifs or figural scenes.

2. Jewelry—Dating from the Cypro-Geometric period (c. 1050 B.C.) through the end of the Roman period (330 A.D.), forms include fibulae, rings, bracelets, and spoons.

C. Gold Jewelry

Gold jewelry has been found on Cyprus from the Early Bronze Age (c. 2300 B.C.) through the end of the Roman period (330 A.D.). Items include hair ornaments, bands, frontlets, pectorals, earrings, necklaces, rings, pendants, plaques, beads, and bracelets.

Inapplicability of Notice and Delayed Effective Date

Because the amendment to the Customs Regulations contained in this document imposing import restrictions on the above-listed cultural property of Cyprus is being made in response to a bilateral agreement entered into in furtherance of the foreign affairs interests of the United States, pursuant to the Administrative Procedure Act, (5 U.S.C. 553(a)(1)), no notice of proposed rulemaking or public procedure is necessary. For the same reason, a delayed effective date is not required pursuant to 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Accordingly, this final rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12866

This amendment does not meet the criteria of a "significant regulatory action" as described in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspections, Imports, Cultural property.

AMENDMENT TO THE REGULATIONS

Accordingly, Part 12 of the Customs Regulations (19 CFR Part 12) is amended as set forth below:

PART 12—[AMENDED]

1. The general authority and specific authority citations for Part 12, in part, continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * * * *

2. In § 12.104g, paragraph (a), the list of agreements imposing import restrictions on described articles of cultural property of State Parties, is amended by adding Cyprus in appropriate alphabetical order as follows:

State	*Cultural Property*	*T.D. No.*
* * *	* * *	*
Cyprus	Archaeological Material of pre-Classical and Classical periods ranging approximately from the 8th millennium B.C. to 330 A.D.	T.D. 02–37
* * *	* * *	*

* * * * * * *

ROBERT C. BONNER,
Commissioner of Customs.

Dated: July 16, 2002.

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 19, 2002 (67 FR 47447)]

U.S. Customs Service

General Notices

PROPOSED COLLECTION; COMMENT REQUEST

PRIOR DISCLOSURE REGULATIONS

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Prior Disclosure Regulations. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before September 16, 2002, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Branch Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In

this document Customs is soliciting comments concerning the following information collection:

Title: Prior Disclosure Regulations
OMB Number: 1515–0212
Form Number: N/A
Abstract: This collection of information is required to implement a provision of the Customs Modernization portion of the North American Free Trade Implementation Act (Mod Act) concerning prior disclosure by a person of a violation of law committed by that person involving the entry or introduction or attempted entry or introduction of merchandise into the United States by fraud, gross negligence or negligence, pursuant to 19 U.S.C. 1592(c)(4), as amended.
Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 3,500
Estimated Time Per Respondent: 60 minutes
Estimated Total Annual Burden Hours: 3,500
Estimated Annualized Cost to the Public: N/A

Dated: July 1, 2002.

TRACEY DENNING,
Information Services Branch.

[Published in the Federal Register, July 16, 2002 (67 FR 46705)]

PROPOSED COLLECTION; COMMENT REQUEST

FOREIGN TRADE ZONE ANNUAL RECONCILIATION CERTIFICATION AND RECORD KEEPING REQUIREMENT

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before September 16, 2002, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Branch Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement

OMB Number: 1515–0151

Form Number: N/A

Abstract: Each Foreign Trade Zone Operator will be responsible for maintaining its inventory control in compliance with statue and regulations. The operator will furnish Customs an annual certification of their compliance.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions

Estimated Number of Respondents: 260

Estimated Time Per Respondent: 45 minutes

Estimated Total Annual Burden Hours: 195

Estimated Total Annualized Cost on the Public: $1,025.50

Dated: July 1, 2002.

TRACEY DENNING,
Information Services Branch.

[Published in the Federal Register, July 16, 2002 (67 FR 46706)]

PROPOSED COLLECTION; COMMENT REQUEST

AUTOMOTIVE PRODUCTS TRADE ACT OF 1965

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Automotive Products Trade Act of 1965. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before September 16, 2002, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Branch Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Automotive Products Trade Act of 1965

OMB Number: 1515–0178

Form Number: N/A

Abstract: Under APTA, Canadian articles may enter the U.S. so long as they are intended for use as original motor vehicle equipment in the U.S. If diverted to other purposes, they are subject to duties. This information collection is issued to track these diverted articles and to collect the proper duties on them.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 12,300
Estimated Time Per Respondent: 15 minutes
Estimated Total Annual Burden Hours: 23,587
Estimated Total Annualized Cost on the Public: $46,500

Dated: July 1, 2002.

TRACEY DENNING,
Information Services Branch.

[Published in the Federal Register, July 16, 2002 (67 FR 46704)]

PROPOSED COLLECTION; COMMENT REQUEST

DOCUMENTS REQUIRED ABOARD PRIVATE AIRCRAFT

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Documents Required Aboard Private Aircraft. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before September 16, 2002, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Branch Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2–C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of auto-

mated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Documents Required Aboard Private Aircraft
OMB Number: 1515–0175
Form Number: N/A
Abstract: The documents required by Customs regulations for private aircraft arriving from foreign countries pertain only to baggage declarations, and if applicable, to Overflight authorizations. Customs' also requires that the pilots present documents required by FAA to be on the plane.
Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 150,000
Estimated Time Per Respondent: 1 minutes
Estimated Total Annual Burden Hours: 2,490
Estimated Total Annualized Cost on the Public: $49,800

Dated: July 1, 2002.

TRACEY DENNING,
Information Services Branch.

[Published in the Federal Register, July 16, 2002 (67 FR 46706)]

PROPOSED COLLECTION; COMMENT REQUEST

ENTRY AND IMMEDIATE DELIVERY APPLICATION

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Entry and Immediate Delivery Application. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before September 16, 2002, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Branch Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Entry and Immediate Delivery Application

OMB Number: 1515–0069

Form Number: Customs Form 3461 and 3461 Alternate

Abstract: Customs Form 3461 and 3461 Alternate are used by importers to provide Customs with the necessary information in order to examine and release imported cargo.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions

Estimated Number of Respondents: 6,100

Estimated Time Per Respondent: 15.5 minutes

Estimated Total Annual Burden Hours: 949,500

Estimated Annualized Cost to the Public: $15,658,500

Dated: June 27, 2002.

TRACEY DENNING,
Information Services Branch.

[Published in the Federal Register, July 16, 2002 (67 FR 46707)]

PROPOSED COLLECTION; COMMENT REQUEST

ENTRY SUMMARY AND CONTINUATION SHEET

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Entry Summary and Continuation Sheet. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before September 16, 2002, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Attn.: Tracey Denning, 1300 Pennsylvania Avenue, NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs Service, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Entry Summary and Continuation Sheet

OMB Number: 1515–0065

Form Number: Customs Form 7501, 7501A

Abstract: Customs Form 7501 is used by Customs as a record of the impact transaction, to collect proper duty, taxes, exactions, certifica-

tions and enforcement endorsements, and to provide copies to Census for statistical purposes.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondent: 38,193
Estimated Time Per Respondent: 20 minutes
Estimated Total Annual Burden Hours: 20,010,000
Estimated Annualized Cost to the Public: $153,295,000

Dated: June 21, 2002.

TRACEY DENNING,
Information Services Branch.

[Published in the Federal Register, July 16, 2002 (67 FR 46707)]

PROPOSED COLLECTION; COMMENT REQUEST

DISCLOSURE OF INFORMATION ON INWARD AND OUTWARD VESSEL MANIFEST

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Disclosure of Information on Inward and Outward Vessel Manifest. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before September 16, 2002, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Branch Printing and Records Services Group, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant

to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Disclosure of Information on Inward and Outward Vessel Manifest

OMB Number: 1515–0124

Form Number: N/A

Abstract: This information is used to grant a domestic importer's, consingee's, and exporter's request for confidentially of its identity from public disclosure.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions

Estimated Number of Respondents: 578

Estimated Time Per Respondent: 30 minutes

Estimated Total Annual Burden Hours: 289

Estimated Total Annualized Cost on the Public: $1,400

Dated: July 1, 2002.

TRACEY DENNING,
Information Services Branch.

[Published in the Federal Register, July 16, 2002 (67 FR 46705)]

PROPOSED COLLECTION; COMMENT REQUEST

CREW'S EFFECTS DECLARATION

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Crew's Effects Declaration. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before September 16, 2002, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Branch Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 927–1429.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Crew's Effects Declaration

OMB Number: 1515–0061

Form Number: Customs Form 1304

Abstract: Customs Form 1304 contains a list of Crew's effects that are accompanying them on the trip, which are required to be manifested, and also the statement of the master of the vessel attesting to the truthfulness of the merchandise being carried on board the vessel as Crew's effects.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions

Estimated Number of Respondents: 206,100

Estimated Time Per Respondent: 5 minutes

Estimated Total Annual Burden Hours: 17,326

Estimated Total Annualized Cost on the Public: $188,150

Dated: July 1, 2002.

TRACEY DENNING,
Information Services Branch.

[Published in the Federal Register, July 16, 2002 (67 FR 46708)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 17, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
(for Michael T. Schmitz, Assistant Commissioner,
Office of Regulations and Rulings.)

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF A PAPER WEB INSPECTION SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letter and revocation of treatment relating to tariff classification of a paper web inspection system.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of apparatus for detecting variances in the quantity and quality of light, and to revoke any treatment Customs has previously accorded to substantially identical transactions. The merchandise at issue, the Autospec System, is used for inspecting the paper web for imperfections during the papermaking process. Customs invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before August 30, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, N.W., Washington, D.C. 20220, during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 572–8779.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification of apparatus for detecting imperfections in the paper web during the papermaking process. Although in this notice Customs is specifically referring to one ruling, *NY* 856065, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transac-

tions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In *NY* 856065, dated September 24, 1990, the Autospec System, apparatus for detecting variances in the quantity and quality of light in the process of inspecting the paper web for imperfections during the papermaking process, among other merchandise, was held to be classifiable in subheading 9031.40.00 (now 49.90), HTSUS, as other optical measuring or checking instruments and appliances. This ruling was based on Customs belief that the apparatus conformed to this subheading description. *NY* 856065 is set forth as "Attachment A" to this document.

It is now Customs position that the Autospec System is classifiable in subheading 9027.50.40, HTSUS, as other electrical instruments and apparatus for physical or chemical analysis using optical radiations. Pursuant to 19 U.S.C. 1625(c)(1)), Customs intends to modify *NY* 856065 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis in *HQ* 965327, which is set forth as "Attachment B" to this document.

Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment it previously accorded to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: July 15, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 24, 1990.

CLA–2–84:S:N:N1:103 856065
Category: Classification
Tariff No. 8419.89.1000 and 9031.40.0080

MS. SUSIE PORTER
THE A. W. FENTON COMPANY INC.
P. O. Box 360614
Columbus, OH 43236–0614

Re: The tariff classification of the Microset Steam Profiler and the Autospec System from West Germany.

DEAR MS. PORTER:

In your letter dated August 29, 1990 on behalf of ABB Process Automation, Inc. you requested a tariff classification ruling.

The Microset Steam Profiler is used to correct variations in the moisture profile of a paper web during the manufacturing process by applying steam to the paper. This action

raises the temperature of the paper sheet and softens its fibers, resulting in improved water removal at the press nip and a denser sheet. The Steam Profiler is custom designed for assembly into the fourdrinier or press sections of a papermaking machine, and is constructed of stainless steel and fiberglass. The unit contains three zones—a front seal zone, a profiling zone, and a turbo seal zone. The front and turbo seal zones eliminate steam leakage from the profile zone. The profile zone is composed of several compartments which selectively apply the steam across the paper sheet. Each Steam Profiler comes with mounting brackets; in addition, a lifting device to retract the unit from the paper web is included for fourdrinier applications. The Steam Profiler can be used with sensors and an electronic moisture control module. However, this ruling covers the Steam Profiler only.

The Autospec System is designed for the inspection of the sheet surface in a moving paper web. The Autospec System inspects the entire sheet surface for holes, spots, and streaks. The system uses CCD (charge coupled device) cameras, which are mounted above or below the sheet surface. A low energy light is beamed through the sheet surface (the transmission method) or reflected off the sheet surface (the light reflection method). The sheet surface image is focused on the CCD camera and a reading is taken. The readings are converted into digital signals for interpretation.

The applicable subheading for the Microset Steam Profiler will be 8419.89.1000, Harmonized Tariff Schedule of the United States (HTS), which provides for other machinery, plant or laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature * * *: for making paper pulp, paper or paperboard. The rate of duty will be 2.4 percent ad valorem.

The applicable subheading for the Autospec System will be 9031.40.0080, HTS, which provides for measuring or checking instruments, appliances and machines, not specified or included elsewhere * * *: other optical instruments and appliances. The rate of duty will be 10 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965327 JAS
Category: Classification
Tariff No. 9027.50.40

JAMES L. SAWYER, ESQ.
KATTEN, MUCHIN ZAVIS ROSENMAN
525 West Monroe Street, Suite 1600
Chicago, IL 60661–3693

Re: *NY* 856065 Modified; Autospec System.

DEAR MR. SAWYER:

In *NY* 856065, which the Area (now Port) Director of Customs, New York, issued to a representative of ABB Process Automation, Inc., now ABB Automation, Inc., on September 24, 1990, the Autospec System, apparatus for inspecting the paper web for imperfections during the papermaking process, among other merchandise, was held to be classifiable in subheading 9031.40.00, Harmonized Tariff Schedule of the United States (HTSUS), as measuring or checking instruments, appliances and machines, n.s.i.e., other

optical instruments and appliances. We have reconsidered this classification and now believe that it is incorrect. In our reconsideration of *NY* 856065, initiated at your request, consideration was given to your submissions, dated November 21, 2001, and June 14, 2002.

Facts:

The merchandise at issue, identified in submitted literature as the ULMA NT Web Inspection System (the System), is apparatus for detecting and locating defects such as holes, dirt, scratches and wrinkles, in the web during the papermaking process. The ULMA NT Web Inspection System and the Autospec System, are believed to be substantially identical. The System consists of the following components: (1) lamps with reflectors, (2) multiple so-called smart cameras with changed coupled device (CCD) technology, (3) one or more image processing computers, and (4) a control panel/operator interface. As imported, these components are connected together by transmission devices and electric cables.

In operation, as the paper web moves continually over a framed conveyor, the lamps, positioned in the bottom of the frame, emit high-intensity light that reflects from or penetrates into the web, depending on its coated or uncoated applications (i.e., base stock, fine writing, printing, tissue, etc.). At the same time, the cameras positioned at the top of the frame detect variations in the intensity of the light, which the computers compare and analyze and, with analog to digital conversion, present as visual images of probable defects in the web. From these, the control operator can take appropriate corrective action.

In your submissions, you maintain that the components of the System constitute a functional unit within Section XVI, Note 4, HTSUS, and that subheading 9027.50.40, HTSUS, instruments and apparatus for physical and chemical analysis using optical radiations, represents the correct classification. Alternatively, you claim that the System is described in subheading 8419.90.20, HTSUS, as other parts of machinery and plant for making paper pulp, paper or paperboard. In support of the heading 9027, HTSUS, classification, you maintain that under General Rule of Interpretation 3(a), HTSUS, heading 9027 provides a more specific description for the Autospec System than does heading 9031, in that it analyzes reflected light as a form of physical analysis on the paper web. You also cite several rulings which classify apparatus incorporating both a light source and CCD camera technology in heading 9027, HTSUS.

The HTSUS provisions under consideration are as follows:

8419	Machinery, plant or laboratory equipment, whether or not electrically heated * * * for the treatment of materials by a process involving a change of temperature such as heating * * *:
8419.90.20 (now **89.10**)	For making paper pulp, paper or paperboard
* * * * * * *	
9027	Instruments and apparatus for physical or chemical analysis; * * * for measuring or checking quantities of heat, sound or light * * *:
9027.50	Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared):
9027.50.40	Electrical
* * * * * * *	
9031	Measuring or checking instruments, appliances and machines, n.s.i.e * * *:
9031.40.00	(now **49.90**) Other

Issue:

Whether the System is a good of heading 9027.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Section XVI, Note 4, HTSUS, states, in part, that where machines interconnected by piping, by transmission devices, by electric cables or by other devices, are intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, the whole is to be classified in the heading appropriate to that function.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. Customs believes the ENs should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Initially, Section XVI, Note 1(m), HTSUS, excludes from that Section articles of Chapter 90. Therefore, if the System is described either by heading 9027 or by heading 9031, heading 8419 is eliminated from consideration. Moreover, because heading 9031 excludes measuring or checking instruments and appliances more specifically included provided for elsewhere, the issue is whether the System is provided for in heading 9027.

Relevant 9027 ENs describe, among other instruments and appliances, **photometers,** which are instruments for measuring the intensity of light. The System consists of a combination of machines, instruments and apparatus whose function essentially is to analyze variations and intensity of light projected onto moving paper web, these variables representing probable defects in the web. The System functions in substantially in the manner of instruments and apparatus of heading 9027. This classification is in accord with *NY* D88130, dated March 4, 1999, and *NY* G86132, dated January 26, 2002, both of which classified CCD cameras utilizing ultraviolet and visible radiations, together with computers, for performing analytic and diagnostic functions, in subheading 9027.50.40, HTSUS.

Holding:

Under the authority of GRI 1 and Section XVI, Note 4, HTSUS, the Autospec System is provided for in heading 9027. It is classifiable in subheading 9027.50.40, HTSUS. The appropriate software, in all cases, is separately classifiable. *NY* 856065, dated September 24, 1990, is modified accordingly.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

MODIFICATION AND REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CONCEPT OF FUNCTIONAL UNITS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification and revocation of ruling letters and revocation of treatment relating to tariff concept of functional units.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying two (2) rulings and revoking two (2) other rulings, all relating to the tariff concept, under the Harmonized Tariff Schedule of the United States (HTSUS), of functional units, and whether functional units may be eligible for classification in heading 8479, HTSUS. In addition, Customs is revoking any treatment previously accorded to substantially identical transactions involving these tariff concepts. This notice applies as well to interpretative rulings identified in this document by control number only. Notice of the proposed modifications and revocations was published on June 5, 2002, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: These modifications and revocations are effective for merchandise entered or withdrawn from warehouse for consumption on or after September 30, 2002.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 572–8779.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to Customs obligations, a notice was published on June 5, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 23, proposing to modify and/or revoke *HQ* 087077, *HQ* 962105, *HQ* 963029 and *HQ* 965123, all relating to the tariff concept under the HTSUS of incomplete or unfinished functional units, and whether functional units may be classified in heading 8479, HTSUS. The notice also covered the following rulings involving the tariff concepts at issue: *HQ* 958629, *HQ* 958641, *HQ* 961210, *HQ* 961441, *HQ* 962945, *HQ* 958577, *HQ* 960816, *HQ* 962659, *HQ* 960632, and *NY* G87193. In addition, the notice proposed to clarify *HQ* 950218, *HQ* 958914, *HQ* 957150, and *NY* E86072 and *NY* H88170 with respect to statements contained therein concerning incomplete or unfinished functional units. Four (4) comments were received in response to this notice, all favoring Customs proposal. These comments will be discussed in the text of the rulings hereinafter cited.

Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously

accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying *HQ* 087077, dated March 27, 1991, to reflect the classification the merchandise to which it relates in subheading 9027.20.40, HTSUS. Customs is also modifying *HQ* 962105, dated April 22, 1999, to reflect the proper classification of the relevant merchandise in headings 8428 and 8515, HTSUS, as appropriate, and also to reflect the fact that goods qualifying as functional units, imported incomplete or unfinished, may be eligible for classification in heading 8479, HTSUS. In addition, Customs is revoking *HQ* 965123, dated February 27, 2002, to reflect the proper classification of the merchandise to which it relates in subheading 8418.61.00, HTSUS. Customs is also revoking *HQ* 963029, dated July 7, 2000, to reflect the proper classification of the relevant merchandise in provisions of headings 8428 and 8515, HTSUS, as appropriate. These modifications and revocations, and Customs current position on the classification principles at issue, are in accordance with the analysis in *HQ* 965634, *HQ* 965635, *HQ* 965637 and *HQ* 965638, which are set forth as the Attachments to this document. As previously noted, the following rulings are also affected: *HQ* 958629, *HQ* 958641, *HQ* 961210, *HQ* 961441, *HQ* 962945, *HQ* 958577, *HQ* 960816, *HQ* 962659, *HQ* 960632, and *NY* G87193. In addition, *HQ* 950218, *HQ* 958914, *HQ* 957150, and *NY* E86072 and *NY* H88170 are clarified with respect to statements contained therein concerning incomplete or unfinished functional units.

As noted in Customs proposal, recipients of rulings either modified or revoked by this notice, other than the four (4) rulings specifically appearing as Attachments appended hereto, are invited to request new rulings on their specific facts, by writing to the Director, National Commodity Specialist Division, U.S. Customs Service, One Penn Plaza, 10th Floor, New York, NY 10119.

Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transac-

tions. In accordance with 19 U.S.C. 1625(c), these rulings will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: July 16, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 16, 2002.

CLA–2 RR:CR:GC 965634 JAS
Category: Classification
Tariff No. 9027.20.40

ROLAND L. SHRULL
MIDDLETON & SCHRULL
44 Mall Road, Suite 106
Burlington, MA 01803

Re: Chromatograph; Instruments and Apparatus for Physical or Chemical Analysis; *HQ* 087077 Modified.

DEAR MR. SHRULL:

In *HQ* 087077, issued to the District (now Port) Director of Customs, Boston, on March 27, 1991, as a response to Internal Advice 25/90, on behalf of VG Instruments, Inc., we held, among other things, that a chromatograph and a chromatography server, imported together, were separately classifiable, in headings 9027 and 8741, Harmonized Tariff Schedule of the United States (HTSUS), respectively. The ruling stated that without the automatic data processing (ADP) machine which receives digitally-formatted data from the server, the apparatus would qualify as an "unfinished functional unit" which is not sanctioned by any HTSUS legal note.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of *HQ* 087077 was published on June 5, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 23. Four (4) comments were received in response to that notice. All favored Customs proposal. These comments are substantially in accordance with the discussion in this ruling under LAW AND ANALYSIS.

Facts:

The merchandise in IA 25/90, the Chromatography Data Management System, consisted of a chromatography server, the chromatograph, used by chemists and others to analyze and measure the constituents in gases or liquids, and an automatic data processing (ADP) unit. The server was said to act as an interface between the chromatograph and the ADP unit by converting analog data received from the chromatograph into digital format, then transmitting that data to the ADP unit. The individual components were connected by electrical cables. Although *HQ* 087077 considered several proposed import configurations, the specific importation consisting of a chromatography server and a chromatograph without the ADP unit is at issue here. The ruling concluded that "because there are no HTSUS legal notes that provide for unfinished functional units" the server and chromatograph were to be classifiable separately. After a thorough review of the matter, we have determined that this is incorrect and no longer represents Customs position in the matter.

The HTSUS provisions under consideration are as follows:

8471	Automatic data processing machines and units thereof; * * *:
8471.99.90 (now **90.00**)	Other
* * * * * * *	
9027	Instruments and apparatus for physical or chemical analysis * * *; instruments and apparatus for measuring or checking viscosity, porosity, expansion * * * or the like * * *:
9027.20	Chromatographs and electrophoresis instruments:
9027.20.40 (now **50**)	Electrical

Issue:

Whether a chromatography server imported with a chromatograph, but without an automatic data processing (ADP) unit, is an incomplete or unfinished good that contributes to a clearly defined function described in heading 9027.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 2(b), HTSUS, extends the scope of a heading to include goods imported incomplete or unfinished provided that, as imported, the incomplete or unfinished good has the essential character of the complete or finished good.

Section XVI, Note 4, HTSUS, covers machines consisting of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapters 84 or 85. The whole, in such cases, is classified in the heading appropriate to that function. Chapter 90, Note 3, HTSUS, applies Note 4 to Section XVI, to goods of Chapter 90.

In the request for internal advice that resulted in *HQ* 087077, the inquirer contended that an importation of a chromatograph and server constituted a functional unit classifiable in subheading 9027.20.40, HTSUS. We rejected that classification on the basis that the ADP unit, missing in this case, was necessary to complete the functional unit.

By its terms, GRI 2(a), HTSUS, extends the scope of a 4-digit heading to include an article, whether assembled or unassembled, that is imported incomplete or unfinished. The imported article, however, must be found to have the essential character of the complete or unfinished good. Section XVI, Note 4, HTSUS, is the authority under GRI 1 for classifying a series of machines or components in a 4-digit heading describing a clearly defined function performed by the goods. Given the relationship between GRI 1 and GRI 2(a) in determining the scope of headings, it logically follows, in our opinion, that GRI 2(a) may also be applied to determine whether under GRI 1 a series of machines or components may qualify for classification under Section XVI, Note 4, even if imported incomplete or unfinished.

Under GRI 2(a), the factor or factors which determine essential character will vary with the goods. It may, for example, be determined by the nature of a component or components, their bulk, quantity, weight or value, or the role of a component or components in relation to the use of the good. It is the latter factor that is the most compelling in this case. The facts here establish that the chromatography server is significant because it integrates input signals, hence it eliminates high frequency noise and protects the integrity of the signals. In addition, if the host computer goes off-line, the server can direct data to alternate computers in the network, and if the entire system goes down, the server can store data until a suitable host computer can be found. Thus, no data is lost. Of course, the ADP unit is equally significant as it is the computer that processes and arranges the data into a usable format. However, it is the chromatograph that performs the actual analyzing and/or measuring function. The chromatograph is the very heart of the Chromatography Data Management System. For this reason, we conclude that an importation consisting of a chromatography server and a chromatograph represents the aggregate of distinctive component parts that establish the identity of the importation as apparatus performing the clearly defined function of chromatography described in heading 9027.

Holding:

Under the authority of GRI 2(a) and Section XVI, Note 4, HTSUS, as applied by Chapter 90, Note 3, HTSUS, a chromatography server and chromatograph, imported together,

constitute a functional unit, incomplete or unfinished, provided for in heading 9027. Actual classification is in subheading 9027.20.40, HTSUS.

Effect on Other Rulings:

HQ 087077, dated March 27, 1991, is modified as to this merchandise. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, July 16, 2002.

CLA–2 RR:CR:GC 965635 JAS
Category: Classification
Tariff No. 8418.61.00

MS. NANCY PELLOWE
TECUMSEH PRODUCTS COMPANY
100 East Patterson Street
Tecumseh, MI 49286

Re: Condensing Unit and Vertical Receiver for Use in Refrigeration; *HQ* 965123 Revoked.

DEAR MS. PELLOWE:

In *HQ* 965123, which we issued to you on February 27, 2002, a condensing unit and a vertical receiver were held to be other parts of refrigerating or freezing equipment, in heading 8418, Harmonized Tariff Schedule of the United States (HTSUS), and a capacitor mounting bracket was held to be an article of iron or steel of heading 7326, HTSUS.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *HQ* 965123 was published on June 5, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 23. Four (4) comments were received in response to that notice. All favored Customs proposal. These comments are substantially in accordance with the discussion in this ruling under LAW AND ANALYSIS.

Facts:

As stated in *HQ* 965123, the articles at issue are a condensing unit, identified as part 2B3142–1, a vertical receiver, identified as part 51080, and a capacitor mounting bracket, identified as part 57068–2. The condensing unit consists of a compressor, a finned coil-type condenser you describe as a heat exchanger, and a fan with motor, all mounted onto a common base. You indicate the unit is principally used in refrigeration applications. The vertical receiver is basically a shell with connections, whose purpose is to hold refrigerant for the condensing unit. The capacitor mounting bracket is of base metal and functions to attach a capacitor (a device which helps in starting or running the compressor) directly onto the compressor or elsewhere on the condensing unit, as the customer designates.

As imported, the condensing unit lacks an evaporator which you indicate is necessary to allow the apparatus to function as refrigeration equipment. After importation, the evaporator will be connected to the condensing unit by brazing tubes with or without fittings. Company guidelines state the distance between condensing unit and evaporator should not normally exceed 100 ft.

The HTSUS provisions under consideration are as follows:

8418	Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; * * * parts thereof:
	Other refrigerating or freezing equipment; * * *:
8418.61.00	Compression type units whose condensers are heat exchangers
	Parts:
8418.99.80	Other

Issue:

Whether the condensing unit, vertical receiver and capacitor mounting bracket, imported without an evaporator, constitute refrigerating or freezing equipment of heading 8418, HTSUS, or parts of such equipment under the same heading.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Section XVI, Note 4, HTSUS, states in part that where a machine, including a combination of machines, consists of individual components, whether separate or interconnected by piping, by transmission devices, by electric cables or other devices, intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole is to be classified in the heading appropriate to that function.

In your ruling request of June 25, 2001, which resulted in *HQ* 965123, you requested classification in subheading 8418.61.00, HTSUS, as other refrigerating or freezing equipment, compression type units whose condensers are heat exchangers. You cited relevant 8418 ENs which, you indicated, stated that apparatus of heading 8418 included units comprising a compressor (with or without motor) and condenser mounted on a common base, whether or not complete with evaporator.

We rejected your claim on the basis that it involved application of the functional unit concept found in Section XVI, Note 4 which, we stated, is a classification at the GRI 1 level, and applies to finished or complete goods. Because the condensing unit lacked the evaporator necessary to its function as refrigerating equipment, the good, as imported, was considered incomplete or unfinished. We concluded that there is no legal authority to classify incomplete or unfinished goods as functional units. We have undertaken a thorough review of the matter and now conclude that this is incorrect and no longer represents Customs position on this issue.

By its terms, GRI 2(a), HTSUS, extends the scope of a 4-digit heading to include an article, whether assembled or unassembled, that is imported incomplete or unfinished. The imported article, however, must be found to have the essential character of the complete or unfinished good. Section XVI, Note 4, HTSUS, is the authority under GRI 1 for classifying a series of machines or components in a 4-digit heading describing a clearly defined function performed by the goods. Given the relationship between GRI 1 and GRI 2(a) in determining the scope of headings, it logically follows, in our opinion, that GRI 2(a) may also be applied to determine whether under GRI 1 a series of machines or components may qualify for classification under Section XVI, Note 4, even if imported incomplete or unfinished.

Under GRI 2(a), the factor or factors which determine essential character will vary with the goods. It may, for example, be determined by the nature of a component or components, their bulk, quantity, weight or value, or the role of a component or components in relation to the use of the good. It is the latter factor that is the most compelling in this case. The cited 8418 ENs establish that compression-type refrigerators are classified in heading 8418 if comprising a compressor (with or without motor) and condenser mounted on a common base, whether or not complete with evaporator. The evaporator will be connected to the condensing unit after importation by brazing tubes with or without fittings. Based on the cited ENs, we conclude that an importation consisting of a compressor with fan and motor, and a condenser together, in this case, with a vertical receiver to hold refrigerant and a capacitor mounting bracket, represents the aggregate of distinctive component parts that establish the identity of the goods as other refrigerating or freezing equipment of heading 8418. If imported separately, however, the capacitor mounting bracket would be classifiable in subheading 8418.99.80, HTSUS, in accordance with *NY* H82804, dated June 29, 2001.

Holding:

Under the authority of GRI 2(a) and Section XVI, Note 4, HTSUS, the condensing unit, part 2B3142–1, the vertical receiver, part 51080, and the capacitor mounting bracket, part 57068–2, are provided for in heading 8418. They are classifiable as other refrigeration or freezing equipment, compression-type units whose condensers are heat exchangers, in subheading 8418.61.00, HTSUS.

Effect on Other Rulings:

HQ 965123, dated February 27, 2002, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 16, 2002.
CLA–2 RR:CR:GC 965637 JAS
Category: Classification
Tariff No. Various

JAMES S. O'KELLY
BARNES, RICHARDSON & COLBURN
475 Park Avenue South
New York, NY 10016

Re: Dedicated Robot Systems; *HQ* 962105 Modified.

DEAR MR. O'KELLY:

In *HQ* 962105, issued to the Port Director, Milwaukee, on April 22, 1999, as a response to Internal Advice 16/98, initiated on behalf of ABB Flexible Automation, Inc., (ABB), certain industrial robot systems imported without end-of-arm tooling, among other articles, were held to be classifiable in headings 8479 and 8537, Harmonized Tariff Schedule of the United States (HTSUS), respectively.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of *HQ* 962105 was published on June 5, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 23. Four (4) comments, including one from you, were received in response to that notice. All favored Customs proposal. These comments are substantially in accordance with the discussion in this ruling under LAW AND ANALYSIS. The classification both of robot systems imported with end-of-arm tooling and work piece positioners expressed in I.A. 16/98 is not at issue here.

Facts:

As described in *HQ* 962105, the merchandise consists of numerous industrial robot systems, each consisting of a robot imported with a model S4C controller. The robots each consist of an articulated structure, similar to an arm, on a base with drilled bolt holes for attachment to a fixed surface. They have lifting capacities or load ratings from 5 kilograms (11 lbs.) to 1,200 kilograms (2460 lbs.). The robots are imported without end-of-arm tooling which dedicates them to a specific end-use service application, such as arc welding, material handling, assembling, spraying, deburring and glueing/sealing, among others. The S4C controllers are devices which utilize preprogrammed software that contains specific operating instructions for the robot's tooling. Each is stand-alone and floor mounted and is connected to its robot by power cables and signal connectors.

Issue:

Whether the robot systems, as described, imported without end-of-arm tooling, constitute functional units, incomplete or unfinished, under Section XVI, Note 4, HTSUS; whether any functional unit is eligible for classification in heading 8479, HTSUS.

The provisions under consideration are as follows:

8428	Other lifting, handling, loading or unloading machinery * * *
*	* * * * * * *
8479	Machines and mechanical appliances having individual functions, not specified or included elsewhere in [chapter 84] * * *
*	* * * * * * *
8515	* * * magnetic pulse or plasma arc soldering, brazing or welding machines and apparatus, whether or not capable of cutting * * *
*	* * * * * * *
8537	Boards, panels, consoles, desks, cabinets and other bases * * *for electric control or the distribution of electricity * * *:

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 2(a) in part extends the terms of a heading to include incomplete or unfinished articles provided that, at importation, they have the essential character of the complete or finished article.

Section XVI, Note 4, HTSUS, states that machines (including a combination of machines) consisting of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapters 84 or 85, then the whole falls to be classified in the heading appropriate to that function.

ABB originally contended that each robot system consisting of a robot and its process controller with task-specific software, imported without end-of-arm tooling, is not precluded from classification as a functional unit inasmuch as the components were *intended* to contribute together to a clearly defined function. Alternatively, ABB asserted that under GRI 3(b), HTSUS, each robot system is a composite good, and that the essential character of each is imparted by the process controller which dedicates the whole to the specific function performed by the end-of-arm tooling.

We rejected the first contention on the basis that "the classification of goods or apparatus as an incomplete or unfinished functional unit is not supported by any HTSUS legal note [or by the ENs]." However, we have undertaken a thorough review of the matter and now conclude that this is incorrect and no longer represents Customs position on this issue. By its terms, GRI 2(a), HTSUS, extends the scope of a 4-digit heading to include an article, whether assembled or unassembled, that is imported incomplete or unfinished. The imported article, however, must be found to have the essential character of the complete or unfinished good. Section XVI, Note 4, HTSUS, is the authority under GRI 1 for classifying a series of machines or components in a 4-digit heading describing a clearly defined function performed by the goods. Given the relationship between GRI 1 and GRI 2(a) in determining the scope of headings, it logically follows, in our opinion, that GRI 2(a) may also be applied to determine whether under GRI 1 a series of machines or components may qualify for classification under Section XVI, Note 4, even if imported incomplete or unfinished.

Under GRI 2(a), the factor or factors which determine essential character will vary with the goods. It may, for example, be determined by the nature of a component or components, their bulk, quantity, weight or value, or the role of a component or components in relation to the use of the good. It is the latter factor that is the most compelling in this case. The facts here establish that each articulated arm or manipulator is permanently configured for a particular service application by an erasable programmable read-only memory (EPROM) chip installed in the controller. In addition, it is indicated that the manipulator dedicated for material handling, for example, has a particular load rating that is suitable only for that service application. There are no generic or general-purpose robot systems; each is specially configured to perform one specific function. Further, the end-of-arm tooling represents a rather small percentage of the total value of the completed robot. Under the particular facts presented, we conclude that an importation consisting of an articulated arm or manipulator and process controller, in which the end use service application of the whole is clearly identifiable, represents the aggregate of distinctive component parts that establish the identity of the good as, for example, material handling machinery of heading 8428, HTSUS, or as electric welding machines or apparatus of heading 8515,

HTSUS, etc. This conclusion renders moot any issue of whether a robot system might be a composite good.

With respect to a robot system which, in accordance with this decision, would be classifiable as a functional unit, imported incomplete or unfinished, *HQ* 962105 stated on p. 5, "[W]e have consistently held that functional units cannot be classified in heading 8479, HTSUS, as that heading does not describe any machine by a clearly defined function." This statement is incorrect and no longer represents Customs position on this issue. A fair and reasonable reading of Section XVI, Note 4, HTSUS, leads us to conclude that goods qualifying as functional units, incomplete or unfinished, are eligible for classification in heading 8479, HTSUS, provided it is the heading appropriate to the function performed by the whole, and the terms and conditions for classification in heading 8479 are satisfied.

Holding:

Under GRI 2(a) and Section XVI, Note 4, HTSUS, industrial robot systems, each consisting of a robot and a model S4C controller, the whole dedicated to a specific end use service application which is clearly identifiable, but imported without end-of-arm tooling, constitute functional units, classifiable in the heading appropriate to the function of the whole.

Effect on Other Rulings:

HQ 962105, dated, April 22, 1999, is modified to recognize both the tariff concept of incomplete or unfinished functional units, and the position that functional units are eligible for classification in heading 8479, HTSUS. In all cases, the preprogrammed software the S4C controller utilizes is classified in appropriate subheadings of heading 8524, in accordance with Chapter 85, Note 6, HTSUS.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 16, 2002.

CLA–2 RR:CR:GC 965638 JAS
Category: Classification
Tariff No. 8428.90.00,
8515.21.00, and 8515.31.00

MR. PAUL S. ANDERSON
SONNENBERG & ANDERSON
333 West Wacker Dr., Suite 2070
Chicago, IL 60606

Re: Industrial Robots With Stand-Alone Controller but Without End-of-Arm Tooling; *HQ* 963029 Revoked.

DEAR MR. ANDERSON:

In *HQ* 963029, issued to you on July 7, 2000, on behalf of Motoman, Inc., program controllers designated MRC, MRC II or XRC, and a programming or teaching pendant, were held to be a functional unit classifiable in a provision of heading 8537, Harmonized Tariff Schedule of the United States (HTSUS). The SK and SV series electrically controlled industrial robots, each consisting of an articulated arm or manipulator on a base, but without appropriate end-of-arm tooling, were held to be separately classifiable in heading 8479, HTSUS.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement

Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *HQ* 963029 was published on June 5, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 23. Four (4) comments were received in response to that notice. All favored Customs proposal. These comments are substantially in accordance with the discussion in this ruling under LAW AND ANALYSIS.

Facts:

The articles at issue are the SK and SV series electrically controlled industrial robots. Each consists of an articulated arm or manipulator on a base, a controller designated MRC, MRC II or XRC, and a programming or teaching pendant. Prior to importation, each robot is "configured," that is, a program of instructions to implement the robot's intended end use service application is burned onto a chip that becomes a permanent part of the controller, which is stand-alone and connected to the manipulator by electrical wiring or cables. The programming pendant is hand-held and attaches by cable to the controller. It functions as an input device that sends operating instructions in the form of signals which the controller interprets and uses to instruct the manipulator.

Although each robot series is best suited, in terms of size, payload capacity and power, for certain applications, the vast majority in this case are specified as being for arc welding, resistance welding, or for material handling. As imported, the robots lack welding guns, grippers or other end-of-arm tooling.

The HTSUS provisions under consideration are as follows:

8428	Other lifting, handling, loading or unloading machinery * * *:
8428.90.00	Other machinery
*	* * * * * * *
8479	Machines and mechanical appliances having individual functions, not specified or included elsewhere in [chapter 85] * * *:
8479.50.00	Industrial robots, not elsewhere specified or included
*	* * * * * * *
8515	Electric * * * soldering, welding or brazing machines and apparatus * * *:
	Machines and apparatus for resistance welding of metal:
8515.21.00	Fully or partly automatic
*	* * * * * * *
8537	* * * other bases * * * for electric control or the distribution of electricity:
8537.10	For a voltage not exceeding 1,000 V:
8537.10.90	Other

Issue:

Whether an articulated arm/manipulator, process controller and programming pendant imported together, but without end-of-arm tooling, constitutes a functional unit, imported incomplete or unfinished.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 2(a), HTSUS, extends the terms of a heading to include goods imported incomplete or unfinished provided that, as imported, the incomplete or unfinished article imparts the essential character to the complete or finished good.

Section XVI, Note 4, HTSUS, covers machines consisting of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapters 84 or 85. The whole, in such cases, is classified in the heading appropriate to that function.

In the ruling request that resulted in *HQ* 963029, you contended that each model in the industrial robot series, with its process controller and programming pendant, constituted an incomplete or unfinished article under General Rule of Interpretation (GRI) 2(a), HTSUS, having the essential character, in this case, of material handling machinery of

heading 8428, HTSUS, or of a welding machine of heading 8515, HTSUS. We rejected that contention on the basis that "the classification of goods or apparatus as an incomplete or unfinished functional unit is not supported by any HTSUS legal note [or by the ENs]." We have undertaken a thorough review of the matter and now conclude that this position is incorrect and no longer represents Customs position on this issue.

By its terms, GRI 2(a), HTSUS, extends the scope of a 4-digit heading to include an article, whether assembled or unassembled, that is imported incomplete or unfinished. The imported article, however, must be found to have the essential character of the complete or unfinished good. Section XVI, Note 4, HTSUS, is the authority under GRI 1 for classifying a series of machines or components in a 4-digit heading describing a clearly defined function performed by the goods. Given the relationship between GRI 1 and GRI 2(a) in determining the scope of headings, it logically follows, in our opinion, that GRI 2(a) may also be applied to determine whether under GRI 1 a series of machines or components may qualify for classification under Section XVI, Note 4, even if imported incomplete or unfinished.

Under GRI 2(a), the factor or factors which determine essential character will vary with the goods. It may, for example, be determined by the nature of a component or components, their bulk, quantity, weight or value, or the role of a component or components in relation to the use of the good. It is the latter factor that is the most compelling in this case. The facts here establish that each articulated arm or manipulator is permanently configured for a particular service application by an erasable programmable read-only memory (EPROM) chip installed in the controller. In addition, it is indicated that the manipulator dedicated for material handling has a particular load rating that is suitable only for that service application. Further, the end-of-arm tooling represents a rather small percentage of the total value of the completed robot. Under the particular facts presented, we conclude that an importation consisting of an articulated arm or manipulator and process controller with programming pendant, represents the aggregate of distinctive component parts that establish the identity of the good as material handling machinery of heading 8428 or as electric welding machines or apparatus of heading 8515, as appropriate.

Holding:

Under the authority of GRI 2(a) and Section XVI, Note 4, HTSUS, an articulated arm or manipulator imported with its configured process controller and programming pendant, constitute a functional unit provided for in headings 8428 and 8515. Actual classification is in subheading 8428.90.00, HTSUS, and in subheadings 8515.21.00 and 8515.31.00, HTSUS, as appropriate.

Effect on Other Rulings:

HQ 963029, dated July 7, 2000, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SKATE SHOES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of skate shoes.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of skate shoes under the Harmonized Tariff Schedule of the United States (HTSUS). Customs is also revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed actions was published on June 12, 2002, in Volume 36, Number 24, of the CUSTOMS BULLETIN. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 30, 2002.

FOR FURTHER INFORMATION CONTACT: Joe Shankle, Textiles Branch, (202) 572–8824.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke New York Ruling Letter (NY) G85697, dated January 19, 2001, and to revoke

any treatment accorded to substantially identical merchandise was published in the June 12, 2002, CUSTOMS BULLETIN, Volume 36, Number 24. No comments were received in response to the notice.

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions that is contrary to the position set forth in this notice. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

In NY G85697, Customs classified a skate shoe consisting of what appears to be a traditional athletic shoe with a heavy sole, the heel portion of which is hollowed out in order to house a polyurethane wheel and wheel assembly, in subheading 9506.99.6080, HTSUSA, which provides, in pertinent part, for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports * * *: Other: Other: Other, Other." Based on our analysis of the scope of the terms of subheadings 9506.99.6080, HTSUSA, and 9506.70.20, HTSUSA, the Legal Notes, and the Explanatory Notes, the skate shoe of the type discussed herein, is classifiable under subheading 9506.70.20, HTSUSA, which provides for: "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Ice skates and roller skates, including skating boots with skates attached; parts and accessories thereof: Roller skates and parts and accessories thereof."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY G85697, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter 964985 (Attached). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment

previously accorded by the Customs Service to substantially identical transactions that is contrary to the position set forth in this notice.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: July 15, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 15, 2002.

CLA–2 RR:CR:TE 964985 JFS
Category: Classification
Tariff No. 9506.70.20

JANET A. FOREST, ESQ.
MILLER & CHEVALIER
655 Fifteenth Street, N.W.
Suite 900
Washington, DC 20005–5701

Re: Revocation of NY G85697, dated January 19, 2001; Classification of Skate Shoe; Chapter 95; Roller Skates.

DEAR MS. FOREST:

This letter is to inform you that Customs has reconsidered New York Ruling Letter (NY) G85697, issued on behalf of your client, Heeling Sports, Ltd., on January 19, 2001, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of skate shoes. After review of that ruling, it has been determined that the classification of the skate shoes in subheading 9506.99.6080, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes NY G85697.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY G85697 was published on June 12, 2002, in the CUSTOMS BULLETIN, *Volume 36, Number 24*. As explained in the notice, the period within which to submit comments on this proposal was until July 19, 2002. No comments were received in response to this notice.

Facts:

The article that is the subject of this revocation is a skate shoe. In NY G85697, it was classified in subheading 9506.99.6080, HTSUSA, which provides, in pertinent part, for: "Articles and equipment for general physical exercise, gymnastics, athletics, other sports * * *: Other: Other: Other, Other." The general column one rate of duty is 4 percent *ad valorem*.

The provided sample, termed a "heeling apparatus" and further identified as the Heelys™ skate shoe, consists of what appears to be a traditional athletic shoe with a heavy sole. The heel portion of the sole is hollowed out in order to house a polyurethane wheel and wheel assembly. The wheel extends approximately one half inch outward from the sole of the shoe and does not retract into the shoe. The wheel and wheel assembly are easily

removed. The Heelys™ skate shoes are used by the wearer by placing one foot in front of the other as if he/she were in full stride. The person's weight centers on the wheel of the rear skate shoe. The rear foot is angled so that the toe of the shoe does not come into contact with the ground. The front foot is also angled so that only the wheel is in contact with the ground. The rear wheel operates as the main rolling wheel and the front wheel provides balance and steering.

Issue:

Whether the Heelys™ skate shoe with one removable wheel in the heel of the shoe is classifiable under the provision for roller skates.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

The skate shoe has the attributes of a traditional roller skate and the attributes of an athletic shoe. Under a GRI analysis, it is, at times, necessary to determine whether the essential character of a good such as the skate shoe is imparted by the wheel or by the shoe. In this case, however, note 1(f) to chapter 64, and Note 1(g) to Chapter 95, render an essential character analysis unnecessary. In pertinent part, Note 1(f) to chapter 64, states that "This chapter does not cover toy footwear or skating boots with ice or roller skates attached. * * *" Note 1(g) to chapter 95 states, in pertinent part, that "This chapter does not cover: Sports footwear (other than skating boots with ice or roller skates attached) of chapter 64. * * *" Accordingly, if it is determined that the Heelys™ skate shoe is a roller skate for classification purposes, chapter 64 is precluded from consideration.

The central issue is whether the Heelys™ skate shoe is encompassed by the term "roller skates, including skating boots with skates attached." The definition of that term under the HTSUSA is uncertain. We find no clear definition in the Legal Notes and EN. Lexicographic sources define a "roller skate" as follows:

> *Merriam-Websters Collegiate Dictionary*, defines a roller skate as "[a] shoe with a set of wheels attached for skating over a flat surface." Available at http://www.m-w.com/cgi-bin/dictionary. *Encarta* defines a roller skate as:
>
> 1. Set of wheels attached to shoe: a metal or plastic frame with wheels attached, usually one pair at the front and another at the back, fastened onto a shoe and used for skating.
> 2. Shoe for roller-skating: a specially designed shoe or boot to which a roller skate is attached.
>
> Available at http://dictionary.msn.com/find/ (May 1, 2002).

While these definitions generally contemplate skates with more than one wheel, they do not necessarily preclude the determination that a shoe with only one wheel can be considered a roller skate for tariff classification purposes. The idea for a roller skate with one wheel dates back at least as far as 1877. In an English patent application, dated June 13, 1877, the inventor describes his idea for a skate with one wheel as follows: "My invention relates to an improved construction of roller skates, wherein each skate is provided with a single wheel or roller placed in the axial line of the foot plate." Patent No. 2297. The accompanying diagram depicts a skate with only one wheel. Likewise, the protestant describes the Heelys™ skate shoe as a roller skate in a trademark application, dated June 2, 2000. The skate shoes were described as "Roller skates equipped with at least one roller used for walking, running and rolling." Application for Trademark Registration, Attorney Docket No.: 4261.15 (trademark application allowed, May 23, 2001, Serial. No. 75/962102). While one-wheeled roller skates may not have been actively manufactured and marketed on a grand scale, the idea has been around for many years.

Turning to the common and commercial meaning of the term "roller skate" we are aware that the production of the Heelys™ skate shoe is such a recent development in the sport of skating, that it may not have been contemplated when any of the usual authorities (legislative history, dictionaries, etc.) were created. That it may be associated with the eo

nomine provisions of subheading 9506.70.20, HTSUSA, is clear under several well settled tenets of Customs law: Eo nomine classification is not necessarily limited by the juxtaposition of descriptive words; an eo nomine designation will include all articles subsequently created which come within its scope. *Sears Roebuck & Co., v. United States*, 46 CCPA 79, C.A.D. 701 (1959); Eo nomine designation of a class will include all members of the class, as if provided by name, *Robert Bosch Corporation, et al v. United States*, 63 Cust.Ct. 187, C.D. 3895 (1969); and an eo nomine designation, without limitation will include all forms of the article. *T.M. Duche & Sons, Inc., et al v. United States*, 44 CCPA 60, C.A.D. 638 (1957).

The instant case is similar to that faced by Customs in Headquarters Ruling Letter (HQ) 086626, dated January 15, 1991, wherein Customs classified snowboards. At the time, the only tariff provision that came close to describing snowboards was the provision for skis. In ruling on the matter, Customs took note that the tariff is not set in time and that tariff provisions can encompass new articles that were not invented at the time of the drafting. Customs asked:

> How then do we determine the classification of a new and novel article of commerce heretofore unknown under the current nomenclature? In particular, how do we determine whether that product is included under an existing nomenclature provision?

To help resolve the issue, Customs relied upon *FAG Bearings, Ltd. v. United States*, 9 CIT 227, 229 (1985), in which the Court stated that:

> The basic requirement for classification of a new product such as these, under a given eo nomine heading is that the article possess an essential resemblance to the one named in the statute. If the essential character of the article is preserved or only incidentally altered, an unlimited eo nomine designation will include the goods.

Customs concluded that "although differences exist between snowboard skis and traditional alpine skis, they do not act as a bar to classification as other skis of subheading 9506.11.4000, HTSUSA."

The major feature that a Heelys ™ skate shoe has in common with a roller skate is that it is to be worn on a person's foot to enable the wearer to roll by means of self-propulsion. In order to accomplish this, the Heelys ™ skate shoe incorporates many of the same features of a traditional roller skate as well as the newer in-line skates. These features are, a heavy duty reinforced sole, a polyurethane wheel, an axle mechanism and ball bearings to provide a smooth and easy ride. Moreover, similar skills are required for "heeling" as are required for roller-skating. As when snowboards were first compared to traditional alpine snow-skis, Heelys ™ skate shoes differ noticeably from traditional roller skates. However, they do possess an essential resemblance to roller skates, and the differences between the two should not act as a bar to their classification as roller skates of subheading 9506.70.20, HTSUSA.

Customs has consistently classified new and similar articles such as in-line skates in subheading 9506.70.20, HTSUSA. Customs has classified skate shoes containing a set of retractable wheels as roller skates. See NY C85189, dated March 11, 1998 (classifying as a roller skate a "Walk and Roll" shoe/skate that could be converted between a walking shoe and a skate by the retraction of one or two roller mechanisms); NY F81566, dated January 13, 2000 (classifying as a roller skate a leather shoe or boot with two holes in the rubber sole where a retractable skate mechanism was attached); and NY H83263, dated July 19, 2001 (classifying as a roller skate a sneaker-like article with front and rear wheel mechanisms that were retractable).

To hold that the term "roller skate" in marketing and sporting circles is restricted to the traditional concept of pairs of wheels, is to ignore an important function of the tariff schedule, namely to provide eo nomine classification for most of the articles in international trade. HQ 086626, dated January 15, 1991. "Tariff provisions should be open to the invention of new and different products." *Id.* "Congress could not have intended to foreclose future innovations in [goods] from classification under the [eo nomine] provisions." *Simmon Omega, Inc. v. United States*, 83 Cust.Ct. 14, C.D. 4815 (1979). "To hold otherwise would result in the classification of any and every new product in the basket provisions of the nomenclature." HQ 086626.

The instant skate shoe is classified in subheading 9506.70.20, HTSUSA, the provision for roller skates.

Holding:

NY G85697 is dated January 19, 2001, is hereby REVOKED. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

The Heelys™ skate shoe is classified under subheading 9506.70.20, HTSUSA, which provides, for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Ice skates and roller skates, including skating boots with skates attached; parts and accessories thereof: Roller skates and parts and accessories thereof." The general column one rate of duty is Free.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF HOME THEATER SOUND SYSTEMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of three ruling letters and treatment relating to the tariff classification of home theater sound systems.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke three ruling letters pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of home theater sound systems and to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before August 30, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, NW, Washington, D.C during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, Commercial Rulings Division, (202) 572–8782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke three ruling letters pertaining to the tariff classification of home theater systems. Although in this notice Customs is specifically referring to three rulings, NY G85405, PD C87740 and NY G88344, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the three identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical

transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY G85405 (December 27, 2000), set forth as "Attachment A" to this document, Customs found that a TSS–1 Home Theater Sound System was classified in subheading 8518.50.00, HTSUS, as an electric sound amplifier set.

In PD C87740 (May 29, 1998), set forth as "Attachment B" to this document, Customs found that a CinemaStation System amplifier and speaker system was classified in subheading 8518.29.80, HTSUS, as loudspeakers, whether or not mounted in their enclosures, other.

In NY G88344 (March 16, 2001), set forth as "Attachment C" to this document, Customs found that an Onkyo Model GXW–5.1 amplifier and speaker system was classified in subheading 8518.29.80, HTSUS, as loudspeakers, whether or not mounted in their enclosures, other.

Customs has reviewed the matter and determined that the correct classification of the amplifier and speaker systems is in subheading 8518.40.20, HTSUS, which provides for audio-frequency electric amplifiers, other.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY G85405, PD C87740, and NY G88344, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letters HQ 964940 (Attachment D), HQ 965762 (Attachment E) and HQ 965763 (Attachment F), respectively. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 16, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 27, 2000.

CLA-2-85:RR:NC:MM:109 G85405
Category: Classification
Tariff No. 8518.50.0000

MR. DENNIS HECK
YAMAHA CORPORATION OF AMERICA
6600 Orangethorpe Avenue
P.O. Box #6600
Buena Park, CA 90622-6600

Re: The tariff classification of the Yamaha TSS-1 Home Theater Sound System from China.

DEAR MR. HECK:

In your letter dated December 8, 2000, you requested a tariff classification ruling.

The merchandise is described in your letter as the Yamaha TSS-1 Home Theater Sound System. It is designed to turn the PC, TV, DVD or Portable Stereo into a premium surround sound system.

The TSS-1 System consists of the following items:

1.) YST-SR601 Amplifier/Sound Processor Unit—This Amplifier/Processor unit has a 48-watt total power output and gas built-in Dolby Digital, DTS and Dolby Pro-Logic decoding. It has an included AC/DC adapter.

2.) Subwoofer—There is one subwoofer containing a 5″ speaker.

3.) Satellite Speakers—There are five (5) satellite speakers each containing a single 2″ speaker.

The system is sold as a complete set.

The applicable subheading for the TSS-1 Home Theater Sound System will be 8518.50.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for "Electric sound amplifier sets." The rate of duty will be 4.9 per cent ad valorem. The rate of duty will remain unchanged in 2001.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 212-637-7048.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 29, 1998.

CLA–2–85:OFO:OM:B26 C87740
Tariff No. 8518.29.8000

MR. DENNIS HECK
6600 Orangethorpe Avenue
P.O. Box 6600
Buena Park, CA 90622–6600

Re: The tariff classification of AV-S7 CinemaStation from Malaysia.

DEAR MR. HECK:

In your letter dated May 7, 1998, you requested a tariff classification ruling for the Yamaha AV-S7 CinemaStation System.

The AV-S7 is designed to give high quality dynamic cinema like sound to the ordinary television set. It consists of a control center/speaker unit, subwoofer/200 watt power amplifier and four satellite speakers. The control center allows the user to command the various functions, such as, Cinema DSP, HiFi DSP and Dolby Pro Logic. The amplifier generates 200 watts of total power (50W goes to the subwoofer and 30W to each of the five speakers), and the speakers provide output dialog and other sounds.

The classification of merchandise within the Harmonized Tariff Schedule of the United States (HTSUS) is governed by the General Rules of Interpretation and any section, chapter and subchapter notes. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Section XVI note 4 provides that a combination of machines consisting of individual components intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or 85, is to be classified as a whole in the heading appropriate to that function. This function is provided by the speakers which produce cinema like surround sound.

The applicable subheading for the AV-S7 CinemaStation System will be 8518.29.8000, HTSUS, which provides for loudspeakers, whether or not mounted in their enclosures, other. The rate of duty will be 4.9 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

JOYCE HENDERSON,
Port Director,
Otay Mesa.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 16, 2001.

CLA–2–85:RR:NC:MM:109 G88344
Category: Classification
Tariff No. 8518.29.8000

MR. KENT SUNAKODA
IMPORT MANAGER
JAMES J. BOYLE & CO.
OCEAN IMPORT & EXPORT
2525 Corporate Place, #100
Monterey Park, CA 91754

Re: The tariff classification of Dolby digital/DTS 5.1ch theater speaker system (Model GXW–5.1) from Japan.

DEAR MR. SUNAKODA:

In your letter dated March 7, 2001, you requested a tariff classification ruling on behalf of Onkyo USA Corporation, Upper Saddle River, NJ 07458.

The merchandise is referred to in your letter as a Dolby digital/DTS 5.1ch theater speaker system (Model GXW–5.1). The system (Model GXW–5.1) is described as consisting of a subwoofer and five (5) satellite speakers. The speaker system can be connected to a stereo system, DVD player, Playstation, personal computer or television set. The subwoofer component has a built-in Dolby digital/DTS decoder and a 6-channel amplifier.

The Dolby digital/DTS 5.1ch theater speaker system (Model GXW–5.1) will be imported in boxes that will include 5 pc–18 gauge speaker cables, 1 pc-remote control (controls volume, input selection and settings), 2 pc-AAA batteries, 5 sets-speaker feet (small square stickers made of cork that are to be attached to the underside, four corners of each speaker unit), 5 sets-speaker holding nuts and an owner's manual.

The applicable subheading for the Dolby digital/DTS 5.1ch theater speaker system (Model GXW–5.1) will be 8518.29.8000, Harmonized Tariff Schedule of the United States (HTS), which provides for Loudspeakers, whether or not mounted in their enclosures: Other: Other. The rate of duty will be 4.9 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 212–637–7048.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 964940 KBR
Category: Classification
Tariff No. 8518.40.20

DENNIS HECK
YAMAHA CORPORATION OF AMERICA
6600 Orangethorpe Avenue
P.O. Box 6600
Buena Park, CA 90622–6600

Re: Reconsideration of NY G85405; Home Theater Sound System.

DEAR MR. HECK:

This is in reference to your letter dated March 6, 2002, in which you requested reconsideration of New York Ruling Letter (NY) G85405, issued to you by the Customs National Commodity Specialist Division, on December 27, 2000, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a home theater sound system. We have reviewed G85405 and have determined that the classification provided is incorrect.

Facts:

NY G85405 concerns the Yamaha TSS–1 Home Theater Sound System. The system consists of: a YST-SR601 amplifier/sound processor unit with 48 watt total power output and built-in Dolby Digital, DTS and Dolby Pro-Logic decoding, powered by an AC/DC adapter; a 5 inch subwoofer; and five satellite speakers each containing a single 2 inch speaker. The system is designed to turn a personal computer (PC), television, DVD or portable stereo into a "surround sound" system. All the components of the system are imported, and will be sold, in the same carton.

In NY G85405, it was determined that the home theater sound system was a electric sound amplifier set, classifiable under subheading 8518.50.00, HTSUS. Yamaha subsequently informed Customs that the home theater sound system did not contain a microphone. You believe that the home theater sound system should be classified under subheading 8518.40.20, HTSUS, as an audio-frequency electric amplifier. We have reviewed that ruling and determined that the classification of the home theater sound system is incorrect. This ruling sets forth the correct classification.

Issue:

What is the proper classification under the HTSUS of the subject home theater sound system?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, Customs looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUS. It is Customs practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

8518	Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones, earphones and combined microphone/speaker sets; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof:
	Loudspeakers, whether or not mounted in their enclosures:

8518.21	Single loudspeakers, mounted in the same enclosure
8518.22.00	Multiple loudspeakers, mounted in the same enclosure
8518.40	Audio-frequency electric amplifiers:
8518.40.20	Other
8518.50.00	Electric sound amplifier sets

The TSS–1 Home Theater Sound System is comprised of three components, the amplifier/sound processor, the subwoofer speaker, and the satellite speakers. EN 85.18(E) describes the term "electronic sound amplifier set" as consisting of three articles: a microphone, an audio-frequency amplifier, and loudspeakers. The home theater sound system does not contain a microphone. Therefore, we believe that classification of the instant goods in subheading 8518.50.00, HTSUS, is incorrect.

There is no disagreement that the home theater system under consideration, Yamaha TSS–1, is classified in heading 8518. The question is whether these goods form a set put up for retail sale. For the instant case, applying GRI 6 at the subheading level, two provisions at the same level of subdivision within heading 8518 describe the home theater sound system in part, amplifiers and loudspeakers. We turn to GRI 3(b) which states that when goods are *prima facie* classifiable under two or more (sub)headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [by reference to the (sub)heading which provides the most specific description], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

EN (X) for GRI 3(b), states that "[f]or the purposes of this Rule, the term 'goods put up in sets for retail sale' shall be taken to mean goods which:

> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings * * *; (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards)."

Here, the TSS–1 Home Theater Sound System has multiple components of different subheadings; is packaged for the specific activity of providing a sound system for a television, DVD, PC, or portable stereo; and is packaged in one box for retail sale directly to the consumer without repacking. Therefore, it qualifies as a set pursuant to GRI 3(b). *See* HQ 085577 (January 10, 1990).

GRI 3(b) states that sets are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable. Under EN (VIII) to GRI 3(b), the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Customs has taken the position that, in an essential character analysis for purposes of GRI 3(b), the role of the constituent materials or components in relation to the use of the goods is generally of primary importance, but the other factors listed in EN (VIII) for GRI 3(b) should also be considered, as applicable (*see, e.g.*, HQ 961095 dated July 20, 1998; HQ 962047 dated May 17, 1999).

The question is which component of the system provides the essential character to the set. The amplifier/sound processor is considered the "heart" of a home theater system. *See Howstuffworks.com*, "How Home Theater Works", by Tom Harris. The amplifier/sound processor provides the power to drive the speakers and subwoofer. The amplifier/sound processor receives a signal from an input device such as a television or DVD player, interprets, decodes and amplifies the signal and sends it to the speakers, and is equipped for Dolby Digital, DTS and Dolby Pro-Logic inputs. It has a master volume control to determine the level of output the speakers produce.

However, the purpose of a home theater system is to provide the listener with a "movie theater" quality "surround sound". The listener uses six speakers to receive sound as if that sound is occurring all around the room. The listener desires the vibrations provided by the subwoofer to get the "feel" of the action.

We find that the TSS–1 Home Theater Sound System does not have one essential character. Both the amplifier/sound processor and the speakers merit equal consideration. Therefore, pursuant to GRI 3(c), the TSS–1 Home Theater Sound System is classifiable

under the subheading which occurs last in numerical order, subheading 8518.40.20, HTSUS, as an audio-frequency electric amplifier, other.

Holding:

Pursuant to GRI 3(c), the TSS–1 Home Theater Sound System is classified in subheading 8518.40.20, HTSUS, an audio-frequency electric amplifier, other.

Effect on Other Rulings:

NY G85405, dated December 27, 2000, is REVOKED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective sixty (60) days after its final publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965762 KBR
Category: Classification
Tariff No. 8518.40.20

DENNIS HECK
YAMAHA CORPORATION OF AMERICA
6600 Orangethorpe Avenue
P.O. Box 6600
Buena Park, CA 90622–6600

Re: Reconsideration of PD C87740; Home Theater Sound System.

DEAR MR. HECK:

This is in reference to Port Decision (PD) C87740, issued to you by the Port Director at Otay Mesa, on May 29, 1998, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a home theater sound system. We have reviewed C87740 and have determined that the classification provided is incorrect.

Facts:

PD C87740 concerns the Yamaha AV-S7 CinemaStation System. The system consists of a control center/center channel speaker unit, a subwoofer/200 watt power amplifier, and four satellite speakers. The control center allows the user to command the various functions, such as Cinema DSP, HiFi DSP, and Dolby Pro Logic. Although the control center/center channel speaker has the infra-red remote control receiver and LED indicator lights, the actual signal processor is located within the same cabinet as the amplifier and subwoofer. The amplifier generates 200 watts of total power, with 50 watts going to the subwoofer and 30 watts to each of the five speakers. The system is designed to turn a television into a "surround sound" system. All the components of the system are imported, and will be sold, in the same carton.

In PD C87740, it was determined that the home theater sound system was classifiable as loudspeakers, whether or not mounted in their enclosures, other, under subheading 8518.29.80, HTSUS. We have reviewed that ruling and determined that the classification of the home theater sound system is incorrect. This ruling sets forth the correct classification.

Issue:

What is the proper classification under the HTSUS of the subject home theater sound system?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic

detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, Customs looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUS. It is Customs practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

8518	Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones, earphones and combined microphone/speaker sets; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof:
	Loudspeakers, whether or not mounted in their enclosures:
8518.21	Single loudspeakers, mounted in the same enclosure
8518.22.00	Multiple loudspeakers, mounted in the same enclosure
8518.40	Audio-frequency electric amplifiers:
8518.40.20	Other
8518.50.00	Electric sound amplifier sets

The AV-S7 CinemaStation System is comprised of three components, the control center/speaker unit, the subwoofer speaker/200 watt amplifier with signal processor, and the satellite speakers. EN 85.18(E) describes the term "electronic sound amplifier set" as consisting of three articles: a microphone, an audio-frequency amplifier, and loudspeakers. The home theater sound system does not contain a microphone. Therefore, we believe that classification of the instant goods in subheading 8518.50.00, HTSUS, is incorrect.

There is no disagreement that the home theater system under consideration, Yamaha AV-S7, is classified in heading 8518. The question is whether these goods form a set put up for retail sale. For the instant case, applying GRI 6 at the subheading level, two provisions at the same level of subdivision within heading 8518 describe the home theater sound system in part, amplifiers and loudspeakers. We turn to GRI 3(b) which states that when goods are *prima facie* classifiable under two or more (sub)headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [by reference to the (sub)heading which provides the most specific description], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

EN (X) for GRI 3(b), states that "[f]or the purposes of this Rule, the term 'goods put up in sets for retail sale' shall be taken to mean goods which:

> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings * * *; (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards)."

Here, the AV-S7 CinemaStation System has multiple components of different subheadings; is packaged for the specific activity of providing a sound system for a television, and is packaged in one box for retail sale directly to the consumer without repacking. Therefore, it qualifies as a set pursuant to GRI 3(b). *See* HQ 085577 (January 10, 1990).

GRI 3(b) states that sets are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable. Under EN (VIII) to GRI 3(b), the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Customs has taken the position that, in an essential character analysis for purposes of GRI 3(b), the role of the constituent materials or components in relation to the use of the goods is generally of primary importance, but the other factors listed in EN (VIII) for GRI 3(b) should also be considered, as applicable (*see, e.g.*, HQ 961095 dated July 20, 1998; HQ 962047 dated May 17, 1999).

The question is which component of the system provides the essential character to the set. The amplifier/sound processor is considered the "heart" of a home theater system. *See Howstuffworks.com*, "How Home Theater Works", by Tom Harris. The amplifier and signal processor provide the power to drive the speakers and subwoofer. The signal processor receives a signal from an input device such as a television, interprets, decodes and amplifies the signal and sends it to the speakers, and is equipped to decode Cinema DSP, HiFi DSP and Dolby Pro-Logic inputs.

However, the purpose of a home theater system is to provide the listener with a "movie theater" quality "surround sound". The listener uses five speakers to receive sound as if that sound is occurring all around the room. The listener desires the vibrations provided by the subwoofer to get the "feel" of the action.

We find that the AV-S7 CinemaStation System does not have one essential character. Both the amplifier and control center, and the speakers merit equal consideration. Therefore, pursuant to GRI 3(c), the AV-S7 CinemaStation System is classifiable under the subheading which occurs last in numerical order, subheading 8518.40.20, HTSUS, as an audio-frequency electric amplifier, other.

Holding:

Pursuant to GRI 3(c), the AV-S7 CinemaStation System is classified in subheading 8518.40.20, HTSUS, an audio-frequency electric amplifier, other.

Effect on Other Rulings:

PD C87740 dated May 29, 1998, is REVOKED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective sixty (60) days after its final publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965763 KBR
Category: Classification
Tariff No. 8518.40.20

MR. KENT SUNAKODA
IMPORT MANAGER
JAMES J. BOYLE & CO.
Ocean Import & Export 2525 Corporate Place, #100
Monterey Park, CA 91754

Re: Reconsideration of NY G88344; Home Theater Sound System.

DEAR MR. SUNAKODA:

This is in reference to a ruling, New York Ruling Letter (NY) G88344, issued to you on behalf of Onkyo USA Corporation, by the Customs National Commodity Specialist Division, on March 16, 2001, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a home theater sound system. We have reviewed G88344 and have determined that the classification provided is incorrect.

Facts:

NY G88344 concerns the Onkyo Dolby digital/DTS 5.1ch (Model GXW–5.1) home theater speaker system. The system consists of a subwoofer and five 10 watt amplified satellite speakers. The subwoofer has a built in Dolby digital/DTS decoder and a six channel signal processor and a 25 watt amplifier. The system is designed to turn a personal computer (PC), television, DVD or portable stereo into a "surround sound" system. All the components of the system are imported, and will be sold, in the same carton.

In NY G88344, it was determined that the home theater speaker system was classifiable as loudspeakers, whether or not mounted in their enclosures, other, cther, under subheading 8518.29.80, HTSUS. We have reviewed that ruling and determined that the classification of the home theater speaker system is incorrect. This ruling sets forth the correct classification.

Issue:

What is the proper classification under the HTSUS of the subject home theater speaker system?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, Customs looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUS. It is Customs practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

8518	Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones, earphones and combined microphone/speaker sets; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof:
	Loudspeakers, whether or not mounted in their enclosures:
8518.21	Single loudspeakers, mounted in the same enclosure
8518.22.00	Multiple loudspeakers, mounted in the same enclosure
8518.40	Audio-frequency electric amplifiers:
8518.40.20	Other
8518.50.00	Electric sound amplifier sets

The Model GXW–5.1 home theater speaker system is comprised of two components, the subwoofer speaker with the built in amplifier/sound processor, and the satellite speakers. EN 85.18(E) describes the term "electronic sound amplifier set" as consisting of three articles: a microphone, an audio-frequency amplifier, and loudspeakers. The home theater sound system does not contain a microphone. Therefore, we believe that classification of the instant goods in subheading 8518.50.00, HTSUS, is incorrect.

There is no disagreement that the home theater system under consideration, Model GXW–5.1, is classified in heading 8518. The question is whether these goods form a set put up for retail sale. For the instant case, applying GRI 6 at the subheading level, two provisions at the same level of subdivision within heading 8518 describe the home theater sound system in part, amplifiers and loudspeakers. We turn to GRI 3(b) which states that when goods are *prima facie* classifiable under two or more (sub)headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [by reference to the (sub)heading which provides the most specific description], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

EN (X) for GRI 3(b), states that "[f]or the purposes of this Rule, the term 'goods put up in sets for retail sale' shall be taken to mean goods which:

> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings * * *; (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards)."

Here, the Model GXW–5.1 home theater speaker system has multiple components of different subheadings; is packaged for the specific activity of providing a sound system for

a television, DVD, PC, or portable stereo; and is packaged in one box for retail sale directly to the consumer without repacking. Therefore, it qualifies as a set pursuant to GRI 3(b). *See* HQ 085577 (January 10, 1990).

GRI 3(b) states that sets are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable. Under EN (VIII) to GRI 3(b), the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Customs has taken the position that, in an essential character analysis for purposes of GRI 3(b), the role of the constituent materials or components in relation to the use of the goods is generally of primary importance, but the other factors listed in EN (VIII) for GRI 3(b) should also be considered, as applicable (*see, e.g.*, HQ 961095 dated July 20, 1998; HQ 962047 dated May 17, 1999).

The question is which component of the system provides the essential character to the set. The amplifier/sound processor is considered the "heart" of a home theater system. *See Howstuffworks.com*, "How Home Theater Works", by Tom Harris. The amplifier/sound processor provides the power to drive the speakers and subwoofer. The amplifier/sound processor receives a signal from an input device such as a television or DVD player, interprets, decodes and amplifies the signal and sends it to the speakers, and is equipped to decode Dolby Digital, DTS and Dolby Pro-Logic inputs. It has a master volume control to determine the level of output the speakers produce.

However, the purpose of a home theater system is to provide the listener with a "movie theater" quality "surround sound". The listener uses 5 speakers to receive sound as if that sound is occurring all around the room. The listener desires the vibrations provided by the subwoofer to get the "feel" of the action.

We find that the Model GXW–5.1 home theater speaker system does not have one essential character. Both the amplifier/sound processor and the speakers merit equal consideration. Therefore, pursuant to GRI 3(c), the Model GXW–5.1 home theater speaker system is classifiable under the subheading which occurs last in numerical order, subheading 8518.40.20, HTSUS, as an audio-frequency electric amplifier, other.

Holding:

Pursuant to GRI 3(c), the Model GXW–5.1 home theater speaker system is classified in subheading 8518.40.20, HTSUS, an audio-frequency electric amplifier, other.

Effect on Other Rulings:

NY G88344, dated March 16, 2001, is REVOKED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective sixty (60) days after its final publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF THE "ENVIRASCAPE GLOWING TIERS RELAXATION CANDLE FOUNTAIN"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a ruling letter and revocation of treatment relating to the tariff classification of the "Envirascape Glowing Tiers Relaxation Candle Fountain" (hereinafter "Envirascape Fountain") under the Harmonized Tariff Schedule of the United States ("HTSUS").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling and to revoke any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of the "Envirascape Fountain". Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before August 30, 2002.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings. Attention: Regulations Branch, 1300 Pennsylvania Avenue.N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, NW, Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 572–8776.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsi-

bilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke New York Ruling Letter (NY) H88127, dated February 20, 2002, which pertains to the tariff classification of the "Envirascape Fountain". NY H88127 is set forth as "Attachment A" to this document.

Although in this notice Customs is specifically referring to one ruling, NY H88127, this notice covers any rulings on similar merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases; no further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, other than the referenced rulings (see above), should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS or other relevant statutes. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY H88127 as it pertains to the classification of the "Envirascape Fountain", and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQ 965521 (*see* "Attachment B" to this document).

Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially

identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 16, 2002.

MARVIN AMERNICK,
for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 20, 2002.

CLA–2–39:RR:NC:SP:222 H88127
Category: Classification
Tariff No. 3926.40.0000

MR. STEVE KUCHTA
KUEHNE & NAGEL, INC.
10 Exchange Place, 19th Floor
Jersey City, NJ 07302

Re: The tariff classification of a relaxation candle fountain from China.

DEAR MR. KUCHTA:

In your letter dated February 4, 2002, you requested a classification ruling.

The submitted sample is a Relaxation Candle Fountain identified as Model #WF-CAN21. It is a combination candle and fountain in one. This table top size fountain measures 7¾ inches tall x 9 inches wide x 10¼ inches in length. The candle fountain consists of 12 tea light scented candles, polished river rocks, four column shaped plastic candles, a plastic tray and a submersible pump with an electrical cord. The plastic column shaped candles each have cut-out circles in the top to hold the tea light candles. The rocks can be attractively arranged on the tray at the base and the submersible pump produces a soothing sound of flowing water. The plastic components impart the essential character to this item.

The sample is returned as you requested.

The applicable subheading for the Relaxation Candle Fountain, Model #WF-CAN21, will be 3926.40.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of plastics and articles of other materials of headings 3901 to 3914: statuettes and other ornamental articles. The rate of duty will be 5.3 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Joan Mazzola at 646–733–3023.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965521 AML
Category: Classification
Tariff No. 9602.00.40

MR. STEVE KUCHTA
KUEHNE & NAGEL, INC.
CORPORATE BRANCH
10 Exchange Place
19th Floor
Jersey City, NJ 07302

Re: Reconsideration of NY H88127; "Envirascape Glowing Tiers Relaxation Candle Fountain".

DEAR MR. KUCHTA:

This is in reply to your letter of March 19, 2002, on behalf of HoMedics, Inc., requesting reconsideration of New York Ruling Letter ("NY") H88127, dated February 20, 2002, concerning the classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of the "Envirascape Glowing Tiers Relaxation Candle Fountain" (hereinafter "Envirascape"). NY H88127 classified the article under subheading 3926.40.00, HTSUS, which provides for other articles of plastic and articles of other materials of headings 3901 to 3914: statuettes and other ornamental articles. A sample and descriptive literature were provided for our consideration. We have reviewed NY H88127 and now believe the classification set forth is incorrect.

Facts:

The article was described in NY H88127 as follows:

> The submitted sample is a Relaxation Candle Fountain identified as Model #WF-CAN21. It is a combination candle and fountain in one. This table top size fountain measures 7¾ inches tall x 9 inches wide x 10¼ inches in length. The candle fountain consists of 12 tea light scented candles, polished river rocks, four column shaped plastic candles, a plastic tray and a submersible pump with an electrical cord. The plastic shaped candles each have cutout circles in the top to hold the tea light candles. The rocks can be attractively arranged on the tray at the base and the submersible pump produces column a soothing sound of flowing water.

In the March 19, 2002 submission, you present a declaration from the manufacturer of the articles that states that the molded, column shaped candles (which we more aptly describe as a columnar "centerpiece" (that resembles relatively large, block candles that house the tea light candles and forms "steps" that redirect water from the pump)) consist of paraffin wax rather than plastic as was determined in NY H88127. Thus, you allege that the article is classifiable under subheading 9602.00.40, HTSUS, which provides for worked vegetable or mineral carving material and articles of these materials; molded or carved articles of wax, of stearin, of natural gums or natural resins, of modeling pastes, and other molded or carved articles, not elsewhere specified or included; worked, unhardened gelatin (except gelatin of heading 3503) and articles of unhardened gelatin: molded or carved articles of wax.

The Customs Laboratory analyzed the composition of the column shaped candleholder (the columnar "centerpiece" (that resembles relatively large, block candles that house the tea light candles and "steps" that redirect water from the pump) composed of paraffin wax)). Customs Laboratory Report No. NY20020430, dated May 31, 2002, concluded that "the sample, a yellow block with holes in the middle, is composed of paraffin wax."

Issue:

What is the classification of the "Envirascape Glowing Tiers Relaxation Candle Fountain"?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined ac-

cording to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. Customs believes the ENs should always be consulted. See T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

2517	Pebbles, gravel, broken or crushed stone, of a kind commonly used for concrete aggregates, for road metalling, or for railway or other ballast * * *:
2517.10.00	Pebbles, gravel, broken or crushed stone, of a kind commonly used for concrete aggregates, for road metalling, or for railway or other ballast * * *
* * * * * * *	
3406	Candles, tapers and the like.
* * * * * * *	
3926	Other articles of plastics * * *
3926.40.00	Statuettes and other ornamental articles.
* * * * * * *	
8413	Pumps for liquids, whether or not fitted with a measuring device * * *
8413.70	Other centrifugal pumps:
8413.70.20	Other.
* * * * * * *	
9602	Worked vegetable or mineral carving material and articles of these materials; molded or carved articles of wax, of stearin, of natural gums or natural resins, of modeling pastes, and other molded or carved articles, not elsewhere specified or included; worked, unhardened gelatin (except gelatin of heading 3503) and articles of unhardened gelatin:
9602.00.40	Molded or carved articles of wax.

We are unable to resolve the classification of the "Envirascape" fountain at GRI 1. GRI 2 is not applicable here except insofar as it provides that "[t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3."

GRI 3 provides as follows:

> When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

EN (IX) to GRI 3(b) provides:

> For purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, provided these components are adapted one to the other and are mutually comple-

mentary and that together they form a whole which would not normally be offered for sale in separate parts.

EN (VIII) to GRI 3(b) provides:

> The factor which determines the essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Pursuant to GRI 3(a), the article is a composite good *prima facie* classifiable under more than a single heading, *i.e.*, headings 2517 (the unpolished rocks), 3406 (candle), 3926 (the plastic "bowl"), 8413 (the pump), and 9602, HTSUS (the columnar "centerpiece" (that resembles relatively large, block candles that house the tea light candles and "steps" that redirect water from the pump) composed of paraffin wax)).

As regards the essential character of the goods, we note several decisions by the Court of International Trade (CIT) which addressed "essential character" for purposes of GRI 3(b). *Better Home Plastics Corp. v. United States*, 916 F. Supp. 1265 (CIT 1996), affirmed, 119 F. 3rd 969 (Fed. Cir. 1997), involved the classification of shower curtain sets, consisting of an outer textile curtain, inner plastic magnetic liner, and plastic hooks. The Court examined the role of the constituent materials in relation to the use of the goods and found that, although the relative value of the textile curtain was greater than that of the plastic liner, and that although the textile curtain also served protective, privacy and decorative functions, because of the fact that the plastic liner served the indispensable function of keeping water inside the shower, the plastic liner imparted the essential character upon the set. See also *Mita Copystar America, Inc. v. United States*, 966 F. Supp. 1245 (CIT 1997), motion for rehearing and reconsideration denied, 994 F. Supp. 393 (CIT 1998), and *Vista International Packaging Co. v. United States*, 19 CIT 868, 890 F. Supp. 1095 (1995), in which the Court also looked to the role of the constituent material in relation to the use of the goods to determine essential character.

The indispensable function of the "Envirascape" fountain is that of a decorative article. The article is intended to be and serves the role of a decoration, *i.e.*, it has no utilitarian value but is wholly ornamental. As such, we must determine which of its components imparts the essential character to the article as a whole.

We believe that neither the unpolished rocks nor the candle impart the essential character to the whole. The rocks appear to be ordinary—oblong shaped, smooth, of unremarkable quality or color. Their presence in the product is to diffuse or redirect the water that will be circulated. It is in this manner that the rocks "contribute" to the decorative role of the good, and we find that the presence of the rocks adds to the appearance and role of the whole without imparting the essential character to the article. Likewise, while the lit candles may draw attention to the article, their presence merely contributes to the appearance of the component good as a whole. Similarly, the tea light candles are ordinary in every respect. Thus, we conclude that neither the rocks nor the candles impart the essential character of the good and accordingly the article is not classifiable under heading 2517 or 3406, HTSUS.

Similarly, the electric pump does not impart the essential character of the article. The "Envirascape" fountain serves a decorative function without the pump, *e.g.*, when the pump is not functioning. The candles and rocks contained in the glass bowl also contribute to the overall appearance and character of the article. We do not believe that the sound of the water is sufficient or serves sufficient enough of a purpose to change our view as to the classification of the fountain. See HQ 964361, dated August 6, 2001, for a similar ruling on a "calming pond."

Pursuant to GRI 3(b), we find that the molded, columnar "centerpiece" (that resembles relatively large, block candles that house the tea light candles and "steps" that redirect water from the pump) composed of paraffin wax imparts the essential character of the "Envirascape" fountain. Essential character has frequently been construed to mean the attribute that strongly marks or serves to distinguish what an article is. After a careful consideration of this issue, we determine that the "Envirascape" fountain is essentially a decorative article of paraffin wax. The wax mold holds the tea light candles and redirects the pumped water that comprise the focal points of the complete and functioning decoration. Accordingly, based upon our determination that the essential character of the "Envirascape" fountain is as an article of paraffin wax, we find that it is provided for under heading 9602, HTSUS.

Our determination is consistent with the following rulings concerning similar articles.

In HQ 958866 dated April 16, 1996, Customs found a copper tabletop water garden to be classified in subheading 8306.29.00, HTSUS, as: "* * * statuettes and other ornaments, of base metal * * *" The article there was described as follows: "* * * a four leaf shaped copper fountain unit connected through copper 'stems' to a plastic water reservoir and pump powered by an electric cord and 3-pronged plug, a copper planter and a decorative rock package.

In NY F83276 dated March 15, 2000, Customs held the model CP–1 "calming pond" to be classified in subheading 3926.40.00, HTSUS as: "Other articles of plastics: * * * Statuettes and other ornamental articles." This classification was affirmed in HQ 964361, dated August 6, 2001. In NY E84043 dated July 27, 1999, Customs classified a decorative "calming pool" in subheading 3926.40.00, HTSUS, as: "Other articles of plastics * * * Statuettes and other ornamental articles."

In HQs 965163 and 965164, both dated August 6, 2001, a tabletop water fountain and an angel fountain, respectively, were classified pursuant to GRI 3(b). In both rulings it was the constituent material of the decorative article that was determined to impart the essential character to the articles.

Holding:

The "Envirascape" fountain is classified under subheading 9602.00.40, HTSUS, which provides for worked vegetable or mineral carving material and articles of these materials; molded or carved articles of wax, of stearin, of natural gums or natural resins, of modeling pastes, and other molded or carved articles, not elsewhere specified or included; worked, unhardened gelatin (except gelatin of heading 3503) and articles of unhardened gelatin: molded or carved articles of wax.

Effect on Other Rulings:

NY H88127 is revoked.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF TREATMENT RELATING TO DRAWBACK ON STEEL TRIM, SCRAP AND WASTE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of treatment relating to drawback on steel trim, scrap and waste.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 USC § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke the treatment allowing drawback on the export of steel trim, scrap and waste. Customs also proposes to revoke any treatment previously accorded by Customs to substantially identical transactions that is contrary to the position set forth in this notice. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before August 30, 2002.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings, Attention: Regulations

Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, NW, Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Renee D'Antonio Chovanec, Duty and Refund Determination Branch: (202) 572–8795.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. § 1625(c)(2)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke the treatment allowing drawback on the export of steel trim, scrap and waste. This treatment may be, among other reasons, the result of the claimant's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to a drawback transaction of the same or similar merchandise, or the claimant's or Customs previous interpretation 19 USC § 1313(b). Any person with interests in drawback on substantially identical merchandise should advise Customs during this notice period. A drawback claimant's failure to advise Customs of drawback transactions involving substantially identical merchandise, may raise issues of reasonable care on the part of the claimant or its agents for drawback on this merchandise subsequent to the effective date of the final decision on this notice.

In *Precision Specialty Metals, Inc. v. United States* (182 F.Supp.2d 1314 (Ct. Intl. Trade 2001)) the Court found that Customs' payment of drawback on 69 drawback claims which included waste as the exported

merchandise to constitute a "treatment" within the meaning of 19 USC § 1625(c)(2) and Title 19, Part 177, Subpart A, § 177.9. Therefore the Court found it necessary for Customs to follow the procedures contained in 19 USC § 1625 in order for Customs to apply its long-held position that drawback is not payable on waste. Per T.D. 81–74, March 31, 1981, which superseded T.D. 80–227 (B), the general manufacturing drawback contract under 19 U.S.C. § 1313(b), Articles Manufactured Using Steel, no drawback is payable on any waste which results from the manufacturing operation.

Therefore, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. § 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical drawback transactions that are contrary to the position set forth in this notice, to reflect the proper application of T. D. 81–74 pursuant to the analysis set forth in proposed Headquarters Ruling Letters HQ 229473; HQ 229581; HQ 229582; HQ 229583; HQ 229584 (Attachments A–E). Before taking this action, consideration will be given to any written comments timely received.

Dated: July 16, 2002.

WILLIAM G. ROSOFF,
(for Myles Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

DRA–2–01 RR:CR:DR
Category: Drawback

ROBIN H. GILBERT, ESQ.
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, NW
Washington, DC 20007

Re: *Precision Specialty Metals, Inc., v. United States*, 182 F.Supp.2d 1314 (Ct. Intl. Trade 2001) and Treasury Decision 81–74.

DEAR MS. GILBERT:

This is in regard to your client Precision Specialty Metals, Inc. Pursuant to the Court's opinion in *Precision Specialty Metals, Inc. v. United States*, (182 F.Supp.2d 1314 (Ct. Intl. Trade 2001)) and the requirements of 19 USC § 1625(c), this is to inform you of Customs revocation of a treatment accorded certain drawback transactions with regard to drawback per 19 USC § 1313(b). Specifically no drawback will be paid on any steel waste, scrap or strip.

Facts:

The claimant claimed drawback under the general ruling for steel (T.D. 81–74). The Customs drawback specialist processing the claims asked for evidence of export. The

claimant provided copies of bills of lading that referred to the export as "scrap steel for re-melting purposes only", "steel scrap sabot", and "stainless steel scrap". Notwithstanding a ruling published as C.S.D. 80–137 which held that the exportation of steel scrap, a valuable waste, did not create eligibility for drawback, Customs liquidated 69 claims granting drawback. Upon discovering that error, Customs denied drawback on the remainder of the claims. The claimant sought judicial review. The court held that the liquidation of those claims was a treatment that could be revoked by Customs only by following the procedure set in 19 USC 1625.

Issue:

Whether the export of steel scrap or any other waste, valuable or valueless, results in entitlement to drawback?

Law and Analysis:

Section 1313(b) of the drawback law (19 USC 1313) provides for substitution of the merchandise used in the manufacture or production of the exported or destroyed article if the imported duty-paid merchandise and substituted merchandise are of the same kind and quality and if both the imported duty-paid merchandise and substituted merchandise are used in manufacture or production by the manufacturer or producer within three years from the date of receipt by the manufacturer or producer of the imported merchandise.

Customs has long held that drawback is not allowable on exports of waste (see, e.g., C.S.D. 80–137 and C.S.D. 82–127 (the former citing *Burgess Battery Co. v. United States*, 13 Cust. Ct. 37, C.D. 866 (1944), and the latter citing a 1932 Customs decision)). In *United States v. Dean Linseed-Oil Co.*, (87 Fed. 453 (2nd Cir. 1898), cert. den., 172 U.S. 647 (1898)), the Government argued that the petitioner was not entitled to any drawback "because oil cake is not a manufactured article, but is waste." (*Id.* at 456.) The court did not dispute that such a defense would have been valid but held that it was not applicable since the Government had considered oil cake to be a manufactured article since 1861.

The court implicitly accepted the Government's position that drawback was unavailable on the exportation of waste by distinguishing the linseed oil cake from tobacco scraps or tobacco clippings, which were held not to be manufactured articles by the U.S. Supreme Court in *Seeberger v. Castro*, (153 U.S. 32 (1894)). Customs has followed this position continuously for many years. See, e.g., C.S.D. 80–137, dated October 22, 1979, wherein Customs held that drawback is not allowable on exportation of valuable waste incurred in the manufacture of rolled steel coils.

The statutory terms "the use of imported merchandise" and "used in the manufacture or production" have been interpreted to exclude valuable waste from such use for nearly 100 years, as shown in *Dean Linseed-Oil* (supra, 87 Fed. 453). Waste which is recovered and which is valuable as waste cannot be said to be used in the manufacture or production of other articles under the relative value concept articulated by the Supreme Court in *National Lead Co. v. United States*, (252 U.S. 140, 144–145 (1920); see also 22 Op. Atty. Gen. 111, 113–114 (1898)).

Since 1936, Customs expressly required that the value of valuable waste be excluded from any manufacturing drawback claim. See T.D. 48490 (1936), which amended Article 1020 of the Customs Regulations of 1931. That regulatory provision has been present in each revision of the drawback regulations. See Article 1041, Customs Regulations of 1937; Section 22.4(a), Customs Regulations of 1943, as amended (1963 ed.) (19 CFR 22.4(a)) and Sections 191.22(a)(2) and 191.32(b), Customs Regulations (19 CFR 191.22(a)(2) and 191.32(b)) (1997 ed.). See also Article 962, Customs Regulations of 1923, which required an applicant for manufacturing drawback to state whether wastage was incurred in the process and the value of such waste.

In fact, the Customs Regulations provide that when waste results from a drawback manufacturing operation, the amount of drawback available may be affected. If the waste has value, drawback may only be claimed on the basis of the quantity of substituted merchandise appearing in the exported articles, or used in the exported articles, less valuable waste (see 19 CFR 191.22(a)(2)). Under the "appearing in" method, the portion of the imported merchandise resulting in waste would not appear in the exported article and, therefore, the effect would be to reduce the amount of drawback available. Under the "used in, less valuable waste" method, the quantity of imported merchandise used to produce the exported articles is reduced by an amount equal to the quantity of merchandise the value of the waste would replace (see 19 CFR 191.22(a)(2)).

Moreover, the general manufacturing drawback contract for steel is published as T.D. 81–74 and includes a portion titled "WASTE" which provides as follows:

> The drawback claimant understands that **no drawback is payable on any waste which results from the manufacturing operation.** Unless the claim for drawback is based on the quantity of steel appearing in the exported articles, the drawback claimant agrees to keep records to establish the value (or the lack of value), the quantity, and the disposition of any waste that results from manufacturing the exported articles. If no waste results, the drawback claimant agrees to keep records to establish that fact.

(emphasis added).

In distinguishing between byproducts (which are drawback eligible) and waste (which is not) when characterizing residual material from manufacturing or production, Customs has generally utilized the following information about the residual material:

1. The nature of the material of which the residue is composed.
2. The value of the residue as compared to the value of the principal product and the raw material.
3. The use to which the residue is put.
4. The classification of the residue under the tariff law, if imported.
5. Whether the residue is a commodity recognized in commerce.
6. Whether the residue must be subjected to some process to make it saleable.

(See, e.g., HQ 226184 (May 28, 1996).) This analysis of residual material is based on judicial interpretations. In *Patton v. United States*, (159 U.S. 500; 16 S. Ct. 89 (1895)), the Court stated that

> [t]he prominent characteristic running through all these definitions [of waste] is that of refuse, or material that is not susceptible of being used for the ordinary purposes of manufacture. It does not presuppose that the article is absolutely worthless, but that it is unmerchantable, and used for purposes for which merchantable material of the same class is unsuitable.

(*Id.* at 503.) The Supreme Court in *Latimer v. United States*, 223 U.S. 501, 32 S. Ct. 242 (1912), also stated that

> [t]he word [waste] as thus used generally refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material.

(*Id.* at 504.)

These Supreme Court cases were cited and relied upon in *Mawer-Gulden-Annis (Inc.) v. United States*, (17 CCPA 270, T.D. 43689 (1929)) in which broken green olives, imported in casks in brine and used to make garnishing or sandwich material, were held not to be waste on the basis that the broken green olives "possess[ed] the same food qualities and some of the uses of whole pitted green olives" (17 CCPA at 272). See also, *Willits & Co. v. United States*, (11 Ct. Cust. App. 499, 501–502, T.D. 39657 (1923)), in which certain beef cracklings were held to be waste as material not susceptible of being used in the ordinary operations of a packing house, material not sought or purposely produced as a by-product in the industry, material not processed after it became a waste, and not possessing the characteristics of its original estate.

In distinguishing between valuable and valueless waste, Customs has basically been governed by whether the waste is a marketable product with more than a negligible value (see letters dated July 18, 1949, from the Acting Commissioner of Customs to the Collector, St. Louis, Missouri; May 8, 1952, from the Chief, Division of Drawbacks, Penalties, and Quotas to the Collector, New York, New York (abstracted as T.D. 52997–(B)); December 17, 1954, from the Chief, Division of Classification and Drawbacks, to the Collector, Cleveland, Ohio (abstracted as T.D. 3701–(F))). If the waste is a marketable product with more than a negligible value, the waste is valuable; if not, the waste is valueless.

Holding:

Based the above court cases, Customs decisions, other precedent and T.D. 81–74, drawback will not be paid on steel scrap, trim or waste. The treatment allowing drawback on steel trim, scrap or waste is revoked.

MYLES HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

DRA–2–01 RR:CR:DR
Category: Drawback

ROBIN H. GILBERT, ESQ.
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, NW
Washington, DC 20007

Re: *Precision Specialty Metals, Inc., v. United States*, 182 F.Supp.2d 1314 (Ct. Intl. Trade 2001) and Treasury Decision 81–74.

DEAR MS. GILBERT:

This is in regard to your client Ulbrich Stainless Steel. Pursuant to the Court's opinion in *Precision Specialty Metals, Inc. v. United States*, (182 F.Supp.2d 1314 (Ct. Intl. Trade 2001)) and the requirements of 19 USC § 1625(c), this is to inform you of Customs revocation of a treatment accorded certain drawback transactions with regard to drawback per 19 USC § 1313(b). Specifically no drawback will be paid on any steel waste, scrap or strip.

Facts:

The claimant claimed drawback under the general ruling for steel (T.D. 81–74). The Customs drawback specialist processing the claims asked for evidence of export. The claimant provided copies of bills of lading that referred to the export as "scrap steel for re-melting purposes only", "steel scrap sabot", and "stainless steel scrap". Notwithstanding a ruling published as C.S.D. 80–137 which held that the exportation of steel scrap, a valuable waste, did not create eligibility for drawback, Customs liquidated 69 claims granting drawback. Upon discovering that error, Customs denied drawback on the remainder of the claims. The claimant sought judicial review. The court held that the liquidation of those claims was a treatment that could be revoked by Customs only by following the procedure set in 19 USC 1625.

Issue:

Whether the export of steel scrap or any other waste, valuable or valueless, results in entitlement to drawback?

Law and Analysis:

Section 1313(b) of the drawback law (19 USC 1313) provides for substitution of the merchandise used in the manufacture or production of the exported or destroyed article if the imported duty-paid merchandise and substituted merchandise are of the same kind and quality and if both the imported duty-paid merchandise and substituted merchandise are used in manufacture or production by the manufacturer or producer within three years from the date of receipt by the manufacturer or producer of the imported merchandise.

Customs has long held that drawback is not allowable on exports of waste (see, e.g., C.S.D. 80–137 and C.S.D. 82–127 (the former citing *Burgess Battery Co. v. United States*, 13 Cust. Ct. 37, C.D. 866 (1944), and the latter citing a 1932 Customs decision)). In *United States v. Dean Linseed-Oil Co.*, (87 Fed. 453 (2nd Cir. 1898), cert. den., 172 U.S. 647 (1898)), the Government argued that the petitioner was not entitled to any drawback "because oil cake is not a manufactured article, but is waste." (*Id.* at 456.) The court did not dispute that such a defense would have been valid but held that it was not applicable since the Government had considered oil cake to be a manufactured article since 1861.

The court implicitly accepted the Government's position that drawback was unavailable on the exportation of waste by distinguishing the linseed oil cake from tobacco scraps or tobacco clippings, which were held not to be manufactured articles by the U.S. Supreme Court in *Seeberger v. Castro*, (153 U.S. 32 (1894)). Customs has followed this position continuously for many years. See, e.g., C.S.D. 80–137, dated October 22, 1979, wherein Customs held that drawback is not allowable on exportation of valuable waste incurred in the manufacture of rolled steel coils.

The statutory terms "the use of imported merchandise" and "used in the manufacture or production" have been interpreted to exclude valuable waste from such use for nearly 100 years, as shown in *Dean Linseed-Oil* (supra, 87 Fed. 453). Waste which is recovered

and which is valuable as waste cannot be said to be used in the manufacture or production of other articles under the relative value concept articulated by the Supreme Court in *National Lead Co. v. United States*, (252 U.S. 140, 144–145 (1920); see also 22 Op. Atty. Gen. 111, 113–114 (1898)).

Since 1936, Customs expressly required that the value of valuable waste be excluded from any manufacturing drawback claim. See T.D. 48490 (1936), which amended Article 1020 of the Customs Regulations of 1931. That regulatory provision has been present in each revision of the drawback regulations. See Article 1041, Customs Regulations of 1937; Section 22.4(a), Customs Regulations of 1943, as amended (1963 ed.) (19 CFR 22.4(a)) and Sections 191.22(a)(2) and 191.32(b), Customs Regulations (19 CFR 191.22(a)(2) and 191.32(b)) (1997 ed.). See also Article 962, Customs Regulations of 1923, which required an applicant for manufacturing drawback to state whether wastage was incurred in the process and the value of such waste.

In fact, the Customs Regulations provide that when waste results from a drawback manufacturing operation, the amount of drawback available may be affected. If the waste has value, drawback may only be claimed on the basis of the quantity of substituted merchandise appearing in the exported articles, or used in the exported articles, less valuable waste (see 19 CFR 191.22(a)(2)). Under the "appearing in" method, the portion of the imported merchandise resulting in waste would not appear in the exported article and, therefore, the effect would be to reduce the amount of drawback available. Under the "used in, less valuable waste" method, the quantity of imported merchandise used to produce the exported articles is reduced by an amount equal to the quantity of merchandise the value of the waste would replace (see 19 CFR 191.22(a)(2)).

Moreover, the general manufacturing drawback contract for steel is published as T.D. 81–74 and includes a portion titled "WASTE" which provides as follows:

> The drawback claimant understands that **no drawback is payable on any waste which results from the manufacturing operation.** Unless the claim for drawback is based on the quantity of steel appearing in the exported articles, the drawback claimant agrees to keep records to establish the value (or the lack of value), the quantity, and the disposition of any waste that results from manufacturing the exported articles. If no waste results, the drawback claimant agrees to keep records to establish that fact.

(emphasis added).

In distinguishing between byproducts (which are drawback eligible) and waste (which is not) when characterizing residual material from manufacturing or production, Customs has generally utilized the following information about the residual material:

1. The nature of the material of which the residue is composed.
2. The value of the residue as compared to the value of the principal product and the raw material.
3. The use to which the residue is put.
4. The classification of the residue under the tariff law, if imported.
5. Whether the residue is a commodity recognized in commerce.
6. Whether the residue must be subjected to some process to make it saleable.

(See, e.g., HQ 226184 (May 28, 1996).) This analysis of residual material is based on judicial interpretations. In *Patton v. United States*, (159 U.S. 500; 16 S. Ct. 89 (1895)), the Court stated that

> [t]he prominent characteristic running through all these definitions [of waste] is that of refuse, or material that is not susceptible of being used for the ordinary purposes of manufacture. It does not presuppose that the article is absolutely worthless, but that it is unmerchantable, and used for purposes for which merchantable material of the same class is unsuitable.

(*Id.* at 503.) The Supreme Court in *Latimer v. United States*, 223 U.S. 501, 32 S. Ct. 242 (1912), also stated that

> [t]he word [waste] as thus used generally refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material.

(*Id.* at 504.)

These Supreme Court cases were cited and relied upon in *Mawer-Gulden-Annis (Inc.) v. United States*, (17 CCPA 270, T.D. 43689 (1929)) in which broken green olives, imported in casks in brine and used to make garnishing or sandwich material, were held not to be

waste on the basis that the broken green olives "possess[ed] the same food qualities and some of the uses of whole pitted green olives" (17 CCPA at 272). See also, *Willits & Co. v. United States*, (11 Ct. Cust. App. 499, 501–502, T.D. 39657 (1923)), in which certain beef cracklings were held to be waste as material not susceptible of being used in the ordinary operations of a packing house, material not sought or purposely produced as a by-product in the industry, material not processed after it became a waste, and not possessing the characteristics of its original estate.

In distinguishing between valuable and valueless waste, Customs has basically been governed by whether the waste is a marketable product with more than a negligible value (see letters dated July 18, 1949, from the Acting Commissioner of Customs to the Collector, St. Louis, Missouri; May 8, 1952, from the Chief, Division of Drawbacks, Penalties, and Quotas to the Collector, New York, New York (abstracted as T.D. 52997–(B)); December 17, 1954, from the Chief, Division of Classification and Drawbacks, to the Collector, Cleveland, Ohio (abstracted as T.D. 3701–(F))). If the waste is a marketable product with more than a negligible value, the waste is valuable; if not, the waste is valueless.

Holding:

Based the above court cases, Customs decisions, other precedent and T.D. 81–74, drawback will not be paid on steel scrap, trim or waste. The treatment allowing drawback on steel trim, scrap or waste is revoked.

MYLES HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

DRA–2–01 RR:CR:DR
Category: Drawback

ROBIN H. GILBERT, ESQ.
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, NW
Washington, DC 20007

Re: *Precision Specialty Metals, Inc., v. United States*, 182 F.Supp.2d 1314 (Ct. Intl. Trade 2001) and Treasury Decision 81–74.

DEAR MS. GILBERT:

This is in regard to your client Joseph T. Ryerson & Son, Inc., (formerly Thypin Steel). Pursuant to the Court's opinion in *Precision Specialty Metals, Inc. v. United States*, (182 F.Supp.2d 1314 (Ct. Intl. Trade 2001)) and the requirements of 19 USC § 1625(c), this is to inform you of Customs revocation of a treatment accorded certain drawback transactions with regard to drawback per 19 USC § 1313(b). Specifically no drawback will be paid on any steel waste, scrap or strip.

Facts:

The claimant claimed drawback under the general ruling for steel (T.D. 81–74). The Customs drawback specialist processing the claims asked for evidence of export. The claimant provided copies of bills of lading that referred to the export as "scrap steel for re-melting purposes only", "steel scrap sabot", and "stainless steel scrap". Notwithstanding a ruling published as C.S.D. 80–137 which held that the exportation of steel scrap, a valuable waste, did not create eligibility for drawback, Customs liquidated 69 claims granting drawback. Upon discovering that error, Customs denied drawback on the remainder of the claims. The claimant sought judicial review. The court held that the liquidation of those claims was a treatment that could be revoked by Customs only by following the procedure set in 19 USC 1625.

Issue:

Whether the export of steel scrap or any other waste, valuable or valueless, results in entitlement to drawback?

Law and Analysis:

Section 1313(b) of the drawback law (19 USC 1313) provides for substitution of the merchandise used in the manufacture or production of the exported or destroyed article if the imported duty-paid merchandise and substituted merchandise are of the same kind and quality and if both the imported duty-paid merchandise and substituted merchandise are used in manufacture or production by the manufacturer or producer within three years from the date of receipt by the manufacturer or producer of the imported merchandise.

Customs has long held that drawback is not allowable on exports of waste (see, e.g., C.S.D. 80–137 and C.S.D. 82–127 (the former citing *Burgess Battery Co. v. United States*, 13 Cust. Ct. 37, C.D. 866 (1944), and the latter citing a 1932 Customs decision)). In *United States v. Dean Linseed-Oil Co.*, (87 Fed. 453 (2nd Cir. 1898), cert. den., 172 U.S. 647 (1898)), the Government argued that the petitioner was not entitled to any drawback "because oil cake is not a manufactured article, but is waste." (*Id.* at 456.) The court did not dispute that such a defense would have been valid but held that it was not applicable since the Government had considered oil cake to be a manufactured article since 1861.

The court implicitly accepted the Government's position that drawback was unavailable on the exportation of waste by distinguishing the linseed oil cake from tobacco scraps or tobacco clippings, which were held not to be manufactured articles by the U.S. Supreme Court in *Seeberger v. Castro*, (153 U.S. 32 (1894)). Customs has followed this position continuously for many years. See, e.g., C.S.D. 80–137, dated October 22, 1979, wherein Customs held that drawback is not allowable on exportation of valuable waste incurred in the manufacture of rolled steel coils.

The statutory terms "the use of imported merchandise" and "used in the manufacture or production" have been interpreted to exclude valuable waste from such use for nearly 100 years, as shown in *Dean Linseed-Oil* (supra, 87 Fed. 453). Waste which is recovered and which is valuable as waste cannot be said to be used in the manufacture or production of other articles under the relative value concept articulated by the Supreme Court in *National Lead Co. v. United States*, (252 U.S. 140, 144–145 (1920); see also 22 Op. Atty. Gen. 111, 113–114 (1898)).

Since 1936, Customs expressly required that the value of valuable waste be excluded from any manufacturing drawback claim. See T.D. 48490 (1936), which amended Article 1020 of the Customs Regulations of 1931. That regulatory provision has been present in each revision of the drawback regulations. See Article 1041, Customs Regulations of 1937; Section 22.4(a), Customs Regulations of 1943, as amended (1963 ed.) (19 CFR 22.4(a)) and Sections 191.22(a)(2) and 191.32(b), Customs Regulations (19 CFR 191.22(a)(2) and 191.32(b)) (1997 ed.). See also Article 962, Customs Regulations of 1923, which required an applicant for manufacturing drawback to state whether wastage was incurred in the process and the value of such waste.

In fact, the Customs Regulations provide that when waste results from a drawback manufacturing operation, the amount of drawback available may be affected. If the waste has value, drawback may only be claimed on the basis of the quantity of substituted merchandise appearing in the exported articles, or used in the exported articles, less valuable waste (see 19 CFR 191.22(a)(2)). Under the "appearing in" method, the portion of the imported merchandise resulting in waste would not appear in the exported article and, therefore, the effect would be to reduce the amount of drawback available. Under the "used in, less valuable waste" method, the quantity of imported merchandise used to produce the exported articles is reduced by an amount equal to the quantity of merchandise the value of the waste would replace (see 19 CFR 191.22(a)(2)).

Moreover, the general manufacturing drawback contract for steel is published as T.D. 81–74 and includes a portion titled "WASTE" which provides as follows:

> The drawback claimant understands that **no drawback is payable on any waste which results from the manufacturing operation.** Unless the claim for drawback is based on the quantity of steel appearing in the exported articles, the drawback claimant agrees to keep records to establish the value (or the lack of value), the quantity, and the disposition of any waste that results from manufacturing the exported

> articles. If no waste results, the drawback claimant agrees to keep records to establish that fact.

(emphasis added).

In distinguishing between byproducts (which are drawback eligible) and waste (which is not) when characterizing residual material from manufacturing or production, Customs has generally utilized the following information about the residual material:

1. The nature of the material of which the residue is composed.
2. The value of the residue as compared to the value of the principal product and the raw material.
3. The use to which the residue is put.
4. The classification of the residue under the tariff law, if imported.
5. Whether the residue is a commodity recognized in commerce.
6. Whether the residue must be subjected to some process to make it saleable.

(See, e.g., HQ 226184 (May 28, 1996).) This analysis of residual material is based on judicial interpretations. In *Patton v. United States*, (159 U.S. 500; 16 S. Ct. 89 (1895)), the Court stated that

> [t]he prominent characteristic running through all these definitions [of waste] is that of refuse, or material that is not susceptible of being used for the ordinary purposes of manufacture. It does not presuppose that the article is absolutely worthless, but that it is unmerchantable, and used for purposes for which merchantable material of the same class is unsuitable.

(*Id.* at 503.) The Supreme Court in *Latimer v. United States*, 223 U.S. 501, 32 S. Ct. 242 (1912), also stated that

> [t]he word [waste] as thus used generally refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material.

(*Id.* at 504.)

These Supreme Court cases were cited and relied upon in *Mawer-Gulden-Annis (Inc.) v. United States*, (17 CCPA 270, T.D. 43689 (1929)) in which broken green olives, imported in casks in brine and used to make garnishing or sandwich material, were held not to be waste on the basis that the broken green olives "possess[ed] the same food qualities and some of the uses of whole pitted green olives" (17 CCPA at 272). See also, *Willits & Co. v. United States*, (11 Ct. Cust. App. 499, 501–502, T.D. 39657 (1923)), in which certain beef cracklings were held to be waste as material not susceptible of being used in the ordinary operations of a packing house, material not sought or purposely produced as a by-product in the industry, material not processed after it became a waste, and not possessing the characteristics of its original estate.

In distinguishing between valuable and valueless waste, Customs has basically been governed by whether the waste is a marketable product with more than a negligible value (see letters dated July 18, 1949, from the Acting Commissioner of Customs to the Collector, St. Louis, Missouri; May 8, 1952, from the Chief, Division of Drawbacks, Penalties, and Quotas to the Collector, New York, New York (abstracted as T.D. 52997–(B)); December 17, 1954, from the Chief, Division of Classification and Drawbacks, to the Collector, Cleveland, Ohio (abstracted as T.D. 3701–(F))). If the waste is a marketable product with more than a negligible value, the waste is valuable; if not, the waste is valueless.

Holding:

Based the above court cases, Customs decisions, other precedent and T.D. 81–74, drawback will not be paid on steel scrap, trim or waste. The treatment allowing drawback on steel trim, scrap or waste is revoked.

MYLES HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

DRA-2-01 RR:CR:DR
Category: Drawback

ROBIN H. GILBERT, ESQ.
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, NW
Washington, DC 20007

Re: *Precision Specialty Metals, Inc., v. United States*, 182 F.Supp.2d 1314 (Ct. Intl. Trade 2001) and Treasury Decision 81–74.

DEAR MS. GILBERT:

This is in regard to your client Combined Metals of Chicago, LLC. Pursuant to the Court's opinion in *Precision Specialty Metals, Inc. v. United States*, (182 F.Supp.2d 1314 (Ct. Intl. Trade 2001)) and the requirements of 19 USC § 1625(c), this is to inform you of Customs revocation of a treatment accorded certain drawback transactions with regard to drawback per 19 USC § 1313(b). Specifically no drawback will be paid on any steel waste, scrap or strip.

Facts:

The claimant claimed drawback under the general ruling for steel (T.D. 81–74). The Customs drawback specialist processing the claims asked for evidence of export. The claimant provided copies of bills of lading that referred to the export as "scrap steel for re-melting purposes only", "steel scrap sabot", and "stainless steel scrap". Notwithstanding a ruling published as C.S.D. 80–137 which held that the exportation of steel scrap, a valuable waste, did not create eligibility for drawback, Customs liquidated 69 claims granting drawback. Upon discovering that error, Customs denied drawback on the remainder of the claims. The claimant sought judicial review. The court held that the liquidation of those claims was a treatment that could be revoked by Customs only by following the procedure set in 19 USC 1625.

Issue:

Whether the export of steel scrap or any other waste, valuable or valueless, results in entitlement to drawback?

Law and Analysis:

Section 1313(b) of the drawback law (19 USC 1313) provides for substitution of the merchandise used in the manufacture or production of the exported or destroyed article if the imported duty-paid merchandise and substituted merchandise are of the same kind and quality and if both the imported duty-paid merchandise and substituted merchandise are used in manufacture or production by the manufacturer or producer within three years from the date of receipt by the manufacturer or producer of the imported merchandise.

Customs has long held that drawback is not allowable on exports of waste (see, e.g., C.S.D. 80–137 and C.S.D. 82–127 (the former citing *Burgess Battery Co. v. United States*, 13 Cust. Ct. 37, C.D. 866 (1944), and the latter citing a 1932 Customs decision)). In *United States v. Dean Linseed-Oil Co.*, (87 Fed. 453 (2nd Cir. 1898), cert. den., 172 U.S. 647 (1898)), the Government argued that the petitioner was not entitled to any drawback "because oil cake is not a manufactured article, but is waste." (*Id.* at 456.) The court did not dispute that such a defense would have been valid but held that it was not applicable since the Government had considered oil cake to be a manufactured article since 1861.

The court implicitly accepted the Government's position that drawback was unavailable on the exportation of waste by distinguishing the linseed oil cake from tobacco scraps or tobacco clippings, which were held not to be manufactured articles by the U.S. Supreme Court in *Seeberger v. Castro*, (153 U.S. 32 (1894)). Customs has followed this position continuously for many years. See, e.g., C.S.D. 80–137, dated October 22, 1979, wherein Customs held that drawback is not allowable on exportation of valuable waste incurred in the manufacture of rolled steel coils.

The statutory terms "the use of imported merchandise" and "used in the manufacture or production" have been interpreted to exclude valuable waste from such use for nearly

100 years, as shown in *Dean Linseed-Oil* (supra, 87 Fed. 453). Waste which is recovered and which is valuable as waste cannot be said to be used in the manufacture or production of other articles under the relative value concept articulated by the Supreme Court in *National Lead Co. v. United States*, (252 U.S. 140, 144–145 (1920); see also 22 Op. Atty. Gen. 111, 113–114 (1898)).

Since 1936, Customs expressly required that the value of valuable waste be excluded from any manufacturing drawback claim. See T.D. 48490 (1936), which amended Article 1020 of the Customs Regulations of 1931. That regulatory provision has been present in each revision of the drawback regulations. See Article 1041, Customs Regulations of 1937; Section 22.4(a), Customs Regulations of 1943, as amended (1963 ed.) (19 CFR 22.4(a)) and Sections 191.22(a)(2) and 191.32(b), Customs Regulations (19 CFR 191.22(a)(2) and 191.32(b)) (1997 ed.). See also Article 962, Customs Regulations of 1923, which required an applicant for manufacturing drawback to state whether wastage was incurred in the process and the value of such waste.

In fact, the Customs Regulations provide that when waste results from a drawback manufacturing operation, the amount of drawback available may be affected. If the waste has value, drawback may only be claimed on the basis of the quantity of substituted merchandise appearing in the exported articles, or used in the exported articles, less valuable waste (see 19 CFR 191.22(a)(2)). Under the "appearing in" method, the portion of the imported merchandise resulting in waste would not appear in the exported article and, therefore, the effect would be to reduce the amount of drawback available. Under the "used in, less valuable waste" method, the quantity of imported merchandise used to produce the exported articles is reduced by an amount equal to the quantity of merchandise the value of the waste would replace (see 19 CFR 191.22(a)(2)).

Moreover, the general manufacturing drawback contract for steel is published as T.D. 81–74 and includes a portion titled "WASTE" which provides as follows:

> The drawback claimant understands that **no drawback is payable on any waste which results from the manufacturing operation.** Unless the claim for drawback is based on the quantity of steel appearing in the exported articles, the drawback claimant agrees to keep records to establish the value (or the lack of value), the quantity, and the disposition of any waste that results from manufacturing the exported articles. If no waste results, the drawback claimant agrees to keep records to establish that fact.

(emphasis added).

In distinguishing between byproducts (which are drawback eligible) and waste (which is not) when characterizing residual material from manufacturing or production, Customs has generally utilized the following information about the residual material:

1. The nature of the material of which the residue is composed.
2. The value of the residue as compared to the value of the principal product and the raw material.
3. The use to which the residue is put.
4. The classification of the residue under the tariff law, if imported.
5. Whether the residue is a commodity recognized in commerce.
6. Whether the residue must be subjected to some process to make it saleable.

(See, e.g., HQ 226184 (May 28, 1996).) This analysis of residual material is based on judicial interpretations. In *Patton v. United States*, (159 U.S. 500; 16 S. Ct. 89 (1895)), the Court stated that

> [t]he prominent characteristic running through all these definitions [of waste] is that of refuse, or material that is not susceptible of being used for the ordinary purposes of manufacture. It does not presuppose that the article is absolutely worthless, but that it is unmerchantable, and used for purposes for which merchantable material of the same class is unsuitable.

(*Id.* at 503.) The Supreme Court in *Latimer v. United States*, 223 U.S. 501, 32 S. Ct. 242 (1912), also stated that

> [t]he word [waste] as thus used generally refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material.

(*Id.* at 504.)

These Supreme Court cases were cited and relied upon in *Mawer-Gulden-Annis (Inc.) v. United States*, (17 CCPA 270, T.D. 43689 (1929)) in which broken green olives, imported in

casks in brine and used to make garnishing or sandwich material, were held not to be waste on the basis that the broken green olives "possess[ed] the same food qualities and some of the uses of whole pitted green olives" (17 CCPA at 272). See also, *Willits & Co. v. United States*, (11 Ct. Cust. App. 499, 501–502, T.D. 39657 (1923)), in which certain beef cracklings were held to be waste as material not susceptible of being used in the ordinary operations of a packing house, material not sought or purposely produced as a by-product in the industry, material not processed after it became a waste, and not possessing the characteristics of its original estate.

In distinguishing between valuable and valueless waste, Customs has basically been governed by whether the waste is a marketable product with more than a negligible value (see letters dated July 18, 1949, from the Acting Commissioner of Customs to the Collector, St. Louis, Missouri; May 8, 1952, from the Chief, Division of Drawbacks, Penalties, and Quotas to the Collector, New York, New York (abstracted as T.D. 52997–(B)); December 17, 1954, from the Chief, Division of Classification and Drawbacks, to the Collector, Cleveland, Ohio (abstracted as T.D. 3701–(F))). If the waste is a marketable product with more than a negligible value, the waste is valuable; if not, the waste is valueless.

Holding:

Based the above court cases, Customs decisions, other precedent and T.D. 81–74, drawback will not be paid on steel scrap, trim or waste. The treatment allowing drawback on steel trim, scrap or waste is revoked.

MYLES HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

DRA–2–01 RR:CR:DR
Category: Drawback

ROBIN H. GILBERT, ESQ.
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, NW
Washington, DC 20007

Re: *Precision Specialty Metals, Inc., v. United States*, 182 F.Supp.2d 1314 (Ct. Intl. Trade 2001) and Treasury Decision 81–74.

DEAR MS. GILBERT:

This is in regard to your client Calstrip Industries, (formerly Calstrip Steel Corp.). Pursuant to the Court's opinion in *Precision Specialty Metals, Inc. v. United States*, (182 F.Supp.2d 1314 (Ct. Intl. Trade 2001)) and the requirements of 19 USC § 1625(c), this is to inform you of Customs revocation of a treatment accorded certain drawback transactions with regard to drawback per 19 USC § 1313(b). Specifically no drawback will be paid on any steel waste, scrap or strip.

Facts:

The claimant claimed drawback under the general ruling for steel (T.D. 81–74). The Customs drawback specialist processing the claims asked for evidence of export. The claimant provided copies of bills of lading that referred to the export as "scrap steel for re-melting purposes only", "steel scrap sabot", and "stainless steel scrap". Notwithstanding a ruling published as C.S.D. 80–137 which held that the exportation of steel scrap, a valuable waste, did not create eligibility for drawback, Customs liquidated 69 claims granting drawback. Upon discovering that error, Customs denied drawback on the remainder of the claims. The claimant sought judicial review. The court held that the liquidation of those claims was a treatment that could be revoked by Customs only by following the procedure set in 19 USC 1625.

Issue:

Whether the export of steel scrap or any other waste, valuable or valueless, results in entitlement to drawback?

Law and Analysis:

Section 1313(b) of the drawback law (19 USC 1313) provides for substitution of the merchandise used in the manufacture or production of the exported or destroyed article if the imported duty-paid merchandise and substituted merchandise are of the same kind and quality and if both the imported duty-paid merchandise and substituted merchandise are used in manufacture or production by the manufacturer or producer within three years from the date of receipt by the manufacturer or producer of the imported merchandise.

Customs has long held that drawback is not allowable on exports of waste (see, e.g., C.S.D. 80–137 and C.S.D. 82–127 (the former citing *Burgess Battery Co. v. United States*, 13 Cust. Ct. 37, C.D. 866 (1944), and the latter citing a 1932 Customs decision)). In *United States v. Dean Linseed-Oil Co.*, (87 Fed. 453 (2nd Cir. 1898), cert. den., 172 U.S. 647 (1898)), the Government argued that the petitioner was not entitled to any drawback "because oil cake is not a manufactured article, but is waste." (*Id.* at 456.) The court did not dispute that such a defense would have been valid but held that it was not applicable since the Government had considered oil cake to be a manufactured article since 1861.

The court implicitly accepted the Government's position that drawback was unavailable on the exportation of waste by distinguishing the linseed oil cake from tobacco scraps or tobacco clippings, which were held not to be manufactured articles by the U.S. Supreme Court in *Seeberger v. Castro*, (153 U.S. 32 (1894)). Customs has followed this position continuously for many years. See, e.g., C.S.D. 80–137, dated October 22, 1979, wherein Customs held that drawback is not allowable on exportation of valuable waste incurred in the manufacture of rolled steel coils.

The statutory terms "the use of imported merchandise" and "used in the manufacture or production" have been interpreted to exclude valuable waste from such use for nearly 100 years, as shown in *Dean Linseed-Oil* (supra, 87 Fed. 453). Waste which is recovered and which is valuable as waste cannot be said to be used in the manufacture or production of other articles under the relative value concept articulated by the Supreme Court in *National Lead Co. v. United States*, (252 U.S. 140, 144–145 (1920); see also 22 Op. Atty. Gen. 111, 113–114 (1898)).

Since 1936, Customs expressly required that the value of valuable waste be excluded from any manufacturing drawback claim. See T.D. 48490 (1936), which amended Article 1020 of the Customs Regulations of 1931. That regulatory provision has been present in each revision of the drawback regulations. See Article 1041, Customs Regulations of 1937; Section 22.4(a), Customs Regulations of 1943, as amended (1963 ed.) (19 CFR 22.4(a)) and Sections 191.22(a)(2) and 191.32(b), Customs Regulations (19 CFR 191.22(a)(2) and 191.32(b)) (1997 ed.). See also Article 962, Customs Regulations of 1923, which required an applicant for manufacturing drawback to state whether wastage was incurred in the process and the value of such waste.

In fact, the Customs Regulations provide that when waste results from a drawback manufacturing operation, the amount of drawback available may be affected. If the waste has value, drawback may only be claimed on the basis of the quantity of substituted merchandise appearing in the exported articles, or used in the exported articles, less valuable waste (see 19 CFR 191.22(a)(2)). Under the "appearing in" method, the portion of the imported merchandise resulting in waste would not appear in the exported article and, therefore, the effect would be to reduce the amount of drawback available. Under the "used in, less valuable waste" method, the quantity of imported merchandise used to produce the exported articles is reduced by an amount equal to the quantity of merchandise the value of the waste would replace (see 19 CFR 191.22(a)(2)).

Moreover, the general manufacturing drawback contract for steel is published as T.D. 81–74 and includes a portion titled "WASTE" which provides as follows:

> The drawback claimant understands that **no drawback is payable on any waste which results from the manufacturing operation.** Unless the claim for drawback is based on the quantity of steel appearing in the exported articles, the drawback claimant agrees to keep records to establish the value (or the lack of value), the quantity, and the disposition of any waste that results from manufacturing the exported

articles. If no waste results, the drawback claimant agrees to keep records to establish that fact.

(emphasis added).

In distinguishing between byproducts (which are drawback eligible) and waste (which is not) when characterizing residual material from manufacturing or production, Customs has generally utilized the following information about the residual material:

1. The nature of the material of which the residue is composed.
2. The value of the residue as compared to the value of the principal product and the raw material.
3. The use to which the residue is put.
4. The classification of the residue under the tariff law, if imported.
5. Whether the residue is a commodity recognized in commerce.
6. Whether the residue must be subjected to some process to make it saleable.

(See, e.g., HQ 226184 (May 28, 1996).) This analysis of residual material is based on judicial interpretations. In *Patton v. United States*, (159 U.S. 500; 16 S. Ct. 89 (1895)), the Court stated that

> [t]he prominent characteristic running through all these definitions [of waste] is that of refuse, or material that is not susceptible of being used for the ordinary purposes of manufacture. It does not presuppose that the article is absolutely worthless, but that it is unmerchantable, and used for purposes for which merchantable material of the same class is unsuitable.

(*Id.* at 503.) The Supreme Court in *Latimer v. United States*, 223 U.S. 501, 32 S. Ct. 242 (1912), also stated that

> [t]he word [waste] as thus used generally refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material.

(*Id.* at 504.)

These Supreme Court cases were cited and relied upon in *Mawer-Gulden-Annis (Inc.) v. United States*, (17 CCPA 270, T.D. 43689 (1929)) in which broken green olives, imported in casks in brine and used to make garnishing or sandwich material, were held not to be waste on the basis that the broken green olives "possess[ed] the same food qualities and some of the uses of whole pitted green olives" (17 CCPA at 272). See also, *Willits & Co. v. United States*, (11 Ct. Cust. App. 499, 501–502, T.D. 39657 (1923)), in which certain beef cracklings were held to be waste as material not susceptible of being used in the ordinary operations of a packing house, material not sought or purposely produced as a by-product in the industry, material not processed after it became a waste, and not possessing the characteristics of its original estate.

In distinguishing between valuable and valueless waste, Customs has basically been governed by whether the waste is a marketable product with more than a negligible value (see letters dated July 18, 1949, from the Acting Commissioner of Customs to the Collector, St. Louis, Missouri; May 8, 1952, from the Chief, Division of Drawbacks, Penalties, and Quotas to the Collector, New York, New York (abstracted as T.D. 52997–(B)); December 17, 1954, from the Chief, Division of Classification and Drawbacks, to the Collector, Cleveland, Ohio (abstracted as T.D. 3701–(F))). If the waste is a marketable product with more than a negligible value, the waste is valuable; if not, the waste is valueless.

Holding:

Based the above court cases, Customs decisions, other precedent and T.D. 81–74, drawback will not be paid on steel scrap, trim or waste. The treatment allowing drawback on steel trim, scrap or waste is revoked.

MYLES HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF MALTITOL SWEETENED WHITE CHOCOLATE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letter and revocation of treatment relating to the classification of maltitol sweetened white chocolate.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of maltitol sweetened white chocolate and revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before August 30, 2002.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, N.W., Washington, D.C during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at 202–572–8768.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202–572–8778.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import re-

quirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of maltitol sweetened white chocolate. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NY) H84179, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In NY H84179, dated August 21, 2001, among other items, the classification of a product commonly referred to as maltitol sweetened white chocolate was determined to be in heading 1704.90.3550, HTSUS, which provides for sugar confectionery (including white chocolate), not containing cocoa: other: confections of sweetmeats ready for consumption: other: other * * * put up for retail sale: other. This ruling letter is set forth in "Attachment A" to this document. Since the issuance of that ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error. The maltitol sweetened white chocolate is not a sugar confectionery and should be classified as a food preparation not elsewhere specified or included, based on its use and ingredient composition. However, Customs lacks

sufficient information about its use and ingredients to determine whether the article is a product of heading 1901, HTSUS, a food preparation of headings 0401 to 0404, or a product of heading 2106, HTSUS, a food preparation not elsewhere specified or included. This notice revokes the classification of maltitol sweetened white chocolate provided in NY H84179 and invites the importer to provide the information needed to properly classify the product should such classification still be desired.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NY H84179, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 965466 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 17, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, August 21, 2002.

CLA–2–18:RR:NC:SP:232 H84179
Category: Classification
Tariff No. 1704.90.3550,
1806.32.9000, and 1806.90.9019

MR. NORMAN ELISBERG
LAFAYETTE SHIPPING COMPANY
2425B 3rd Street
Fort Lee, NJ 07024–4051

Re: The tariff classification of Confectionery from Belgium.

DEAR MR. ELISBERG:

In your letter dated July 30, 2001, on behalf of Sugar Free Bars, LLC. of Midland Park, New Jersey, you requested a tariff classification ruling.

You submitted samples with your request. The subject merchandise is a variety of sugar free chocolate bars and confections. One type is a 42-gram milk chocolate bar; 5 inches long by 1 inch wide by ½ inch deep and individually wrapped for retail sale. They are scored to enable breaking them into six segments. The sample labels indicate that these bars contain 41.6 percent maltitol, 24.1 percent cocoa butter, 22.3 percent milk powder, 11.6 percent cocoa liquor, and traces of lecithin, vanilla, and flavors such as mint, peanut, and raspberry.

Another product line includes 100-gram bars, 6 inches wide by 3 inches high by 3/8 inch thick, also individually wrapped for retail sale. These bars come in 3 flavors. They are scored to enable breaking them into twenty-four small pieces. According to the product labels, the milk chocolate bar is said to contain maltitol, cocoa butter, milk powder, cocoa liquor, lecithin, and vanilla. The dark chocolate bar is said to contain cocoa liquor, maltitol, cocoa butter, lecithin, and vanilla. The white chocolate bar is stated to consist of maltitol, cocoa butter, milk powder, lecithin, and vanilla.

The next item is a 130 gram boxed assortment of chocolates. Theses are described as containing maltitol, cocoa butter, milk powder, cocoa liquor, hazelnuts, vegetable fat, lecithin, vanilla, and flavors such as coffee, cointreau, and mandarin napoleon.

The applicable subheading for the white chocolate bar will be 1704.90.3550, Harmonized Tariff Schedule of the United States (HTS), which provides for Sugar confectionery (including white chocolate), not containing cocoa: Other: Confections or sweetmeats ready for consumption: Other: Other * * * Put up for retail sale: Other. The rate of duty will be 5.6 percent ad valorem.

The applicable subheading for the remaining chocolate bars will be 1806.32.9000, Harmonized Tariff Schedule of the United States (HTS), which provides for Chocolate and other food preparations containing cocoa: Other, in blocks, slabs or bars: Not filled: Other: Other. The rate of duty will be 6 percent ad valorem.

The applicable subheading for the boxed candy will be 1806.90.9019, Harmonized Tariff Schedule of the United States (HTS), which provides for Chocolate and other food preparations containing cocoa: Other: Other: Other * * * Confectionery: Other. The rate of duty will be 6 percent ad valorem.

The Food and Drug Administration may impose additional requirements on these products. You may contact the FDA at:

Food and Drug Administration
Implementation and Compliance Branch
HFF 314, 200 C Street, SW
Washington, D.C. 20204
(202) 205–5321

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides, in general, that all articles of foreign origin imported into the United States must be legibly, conspicuously, and permanently marked to indicate the English name of the country of origin to an ultimate purchaser in the United States. The implementing regulations to 19 U.S.C. 1304 are set forth in Part 134, Customs Regulations (19 CFR Part 134). The samples you have submitted do not appear to be properly marked with the country of origin. You may wish to discuss the matter of country of origin marking with the Customs import specialist at the proposed port of entry.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist John Maria at (212) 637–7059.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965466ptl
Category: Classification
Tariff No. 1901/2106

MR. NORMAN ELISBERG
LAFAYETTE SHIPPING COMPANY
2425B 3rd Street
Fort Lee, NJ 07024–4051

Re: Maltitol Sweetened White Chocolate, NY H84179 modified.

DEAR MR. ELISBERG:

This is in reference to New York Ruling Letter (NY) H84179, issued to you on August 21, 2002, by the Director, National Commodity Specialist Division, New York, on behalf of Sugar Free Bars. LLC., in which a variety of sugar free chocolate bars and confections were classified under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed that ruling and determined that the classification provided for the maltitol sweetened white chocolate bar is incorrect for the reasons stated below. However, because we lack sufficient information regarding the products use and ingredients, we are unable to determine whether the correct classification of the product. Should the importer desire a ruling on this product, a new ruling request setting forth all relevant facts about the product may be submitted to the Director, National Commodity Specialist Division, U.S. Customs, Attn: CIE/Ruling Request, One Penn Plaza, 10th Floor, New York, NY 10119. This letter does not effect classification of other products in NY H84179.

Facts:

The according to the available information, the subject product is a 100-gram bar, 6 inches wide by 3 inches high and 3/8 inch thick, individually wrapped for retail sale. The ingredients of the white chocolate bar are stated to consist of maltitol, cocoa butter, milk powder, lecithin, and vanilla. IN NY H84179, this product was classified in subheading 1704.90.3550, HTSUS, which provides for sugar confectionery (including white chocolate), not containing cocoa: other: confections or sweetmeats ready for consumption: other: other * * * put up for retail sale: other.

Issue:

What is the classification of maltitol sweetened white chocolate bars?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings under consideration are as follows:

1704	Sugar confectionery (including white chocolate), not containing cocoa:
1704.90	Other:
	Confections or sweetmeats ready for consumption:
1704.90.35	Other:
	Put up for retail sale:
1704.90.3550	Other
1901	Malt extract; food preparations of flour, groats, meal, starch or malt extract, not containing cocoa or containing less than 40 percent by weight

of cocoa calculated on a totally defatted basis, not elsewhere specified or included; food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5 percent by weight of cocoa calculated on a totally defatted basis, not elsewhere specified of included:

2106 Food preparations not elsewhere specified or included.

Heading 1704 provides for sugar confectionery (including white chocolate), not containing cocoa. The ENs state that "This heading covers most of the sugar preparations which are marketed in a solid or semi-solid form, generally suitable for immediate consumption and collectively referred to as **sweetmeats, confectionery** or **candies.** The white chocolate is sold in a bar form, individually wrapped for retail sale and immediate consumption. However, it is not a sugar confectionery. The product contains maltitol instead of sugar.

The types of products which are considered to be sugars of Chapter 17 are described in the General Note to the ENs of Chapter 17: "This Chapter covers not only sugars as such (e.g., sucrose, lactose, maltose, glucose and fructose), but also sugar syrups, artificial honey, caramel, molasses resulting from the extraction or refining of sugar and sugar confectionery. Solid sugar and molasses of this Chapter may contain added flavouring or colouring matter."

According to the website of the Calorie Control Council (*www.caloriecontrol.org*), "Maltitol is a reduced calorie buk [sic] sweetner [sic] with sugar-like taste and sweetness. * * * Maltitol is a member of a family of bulk sweetener known as polyols or sugar alcohols. * * * Maltitol is made by the hydrogenation of maltose which is obtained from starch. Like other polyols, it does not brown or caramelize as do sugars." The website states that maltitol is useful because it does not promote tooth decay, it is useful in the manufacture of sucrose-free chocolate, and may be useful for people with diabetes." Maltitol is classified under subheading 2950.49.4000, HTSUS, which provides for Acyclic alcohols and their halogenated, sulfonated, nitrated or nitrosated derivatives: other polyhydric alcohols * * * other: poylhydric alcohols derived from sugars * * * other.

The ENs to heading 17.04 list types of products which are excluded from the heading. Paragraph (d) provides, in relevant part, as follows:

> "(d) Sweets, gums and the like (for diabetics, in particular) containing synthetic sweetening agents (e.g., sorbitol) instead of sugar, * * *"

Because the maltitol sweetened white chocolate bars do not contain sugar, they cannot be classified in Chapter 17. Possible alternative headings for the product is heading 1901, HTSUS, which provides for food preparations of headings 0401 to 0404, and heading 2106, HTSUS, which provides for food preparations not elsewhere specified or included. Classification of the product will depend on the relative weights of each ingredient and, in particular, the relative quantities of milk powder and cocoa butter.

Should the importer desire a binding ruling on the maltitol sweetened white chocolate bars, a ruling request containing all necessary information should be submitted to the Director, National Commodity Specialist Division, U.S. Customs, Attn: CIE/Ruling Request, One Penn Plaza, 10th Floor, New York, NY 10119.

Holding:

NY H84179, dated August 21, 2001, is modified with regard to the classification of maltitol sweetened white chocolate bars.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

(Slip Op. 02–63)

SKF USA INC., SKF FRANCE S.A., SARMA, SKF GMBH, SKF INDUSTRIE S.P.A., AND SKF SVERIGE AB, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 98–07–02540

(Dated July 12, 2002)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *SKF USA Inc. v. United States*, 2001 Ct. Intl. Trade LEXIS 134, Slip Op. 01–130 (Nov. 15, 2001) ("Remand Results"), comments of SKF USA Inc., SKF France S.A., Sarma, SKF GmbH, SKF Industrie S.p.A. and SKF Sverige AB, comments and rebuttal comments of The Torrington Company and Commerce's response, holds that Commerce duly complied with the Court's remand order, and it is hereby

ORDERED that the Remand Results filed by Commerce on April 1, 2002, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 02–64)

FAG KUGELFISCHER GEORG SCHAFER AG, FAG ITALIA S.P.A., BARDEN CORP. (U.K.) LTD., FAG BEARINGS CORP., AND BARDEN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 99–08–00465

(Dated July 12, 2002)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *FAG Kugelfischer Georg Schafer AG v. United States,* 2001 Ct. Intl. Trade LEXIS 144, Slip Op. 01–131 (Nov. 15, 2001) ("Remand Results"), response of FAG Kugelfischer Georg Schafer AG, FAG Italia S.p.A., Barden Corporation (U.K.) Ltd., FAG Bearings Corporation and The Barden Corporation, comments and rebuttal comments of The Torrington Company and Commerce's response, holds that Commerce duly complied with the Court's remand order, and it is hereby

ORDERED that the Remand Results filed by Commerce on April 1, 2002, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 02–65)

ALTX, INC., AMERICAN EXTRUDED PRODUCTS, CORP, DMV STAINLESS USA, INC., SALEM TUBE, INC., SANDVIK STEEL CO., PENNSYLVANIA EXTRUDED TUBE CO., AND UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, PLAINTIFFS *v.* UNITED STATES, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND SUMITOMO METAL INDUSTRIES, NIPPON STEEL CORP, KAWASAKI STEEL CORP, NKK CORP, KOBE STEEL LTD., AND SANYO SPECIAL STEEL CO., DEFENDANT-INTERVENORS

Court No. 00–09–00477

[ITC material injury remand determination remanded.]

(Dated July 12, 2002)

Collier Shannon Scott, PLLC (David A. Hartquist, Jeffrey S. Beckington, and *R. Alan Luberda)* for plaintiffs.

Lyn M. Schlitt, General Counsel, *Marc A. Bernstein,* Assistant General Counsel, United States International Trade Commission *(Rhonda M. Hughes),* for defendants.

Wilmer, Cutler & Pickering (John D. Greenwald, Leonard Shambon, and *Lynn M. Fischer)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter comes before the court as a result of the court's decision in *Altx, Inc. v. United States,* 167 F. Supp. 2d 1353 (Ct. Int'l Trade 2001) [hereinafter, *"Altx I"].* There, the court remanded *Circular Seamless Stainless Steel Hollow Products ["CSSSHP"] from Japan,* Inv. No. 731–TA–859 (Final), USITC Pub. 3344 (Aug. 2000) [hereinafter, "Final Determination"], for the International Trade Commission (the "ITC" or the "Commission") to reconsider and to explain more fully its negative injury determination in light of certain arguments raised by plaintiffs Altx, Inc., American Extruded Products Corp., DMV Stainless USA, Inc., Salem Tube, Inc., Sandvik Steel Co., Pennsylvania Extruded Tube Company, and United Steelworkers of America, AFL-CIO/CLC (collectively, the "Domestic Producers"). In the *Final Results of Redetermination Pursuant to Court Remand* (Int'l Trade Comm'n Dec. 3, 2001) [hereinafter, "Remand Determination"], the Commission, in a 3–3 vote, rendered an affirmative injury determination. The Remand Determination adopts in full and without change the Additional and Dissenting Views of Chairman Stephen Koplan and Vice Chairman Deanna Tanner Okun that had been issued pursuant to the original determination, joined by Chairman Dennis M. Devaney, who was appointed after the issuance of *Altx I. See* Final Determination at 1 n.2, and Remand Determination at 2. Defendant-Intervenors in *Altx I* and respondents in the underlying investigation, Sumitomo Metal Industries, Inc., Nippon Steel Corporation, Kawasaki Steel Corporation, NKK Corporation, Kobe Steel, Ltd., and Sanyo Special Steel Company, Ltd. (collectively, the "Japanese Producers"), appeal the Remand Determination on two grounds. First, the Japanese Pro-

ducers assert that the Commission majority did not adequately address material arguments raised in their post-hearing briefs, and drew conclusions of fact that do not fairly reflect the evidence on the record. Second, the Japanese Producers contest the legitimacy of the appointment of Commissioner Devaney and seek invalidation of his affirmative remand vote. Because of various inadequacies in the Remand Determination, the court remands it on substantive grounds and does not reach the second issue.[1]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those agency determinations which are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Volume

Under 19 U.S.C. § 1677(7)(C)(i), the Commission shall consider "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." First, Japanese Producers claim that the Commission's volume calculations are inaccurate. Second, Japanese Producers claim that even if the Commission's calculations were proper, the Commission ignored various conditions of competition that undermine its conclusions as to the significance of subject import volume.

A. Purchases of Subject Merchandise by Domestic Producers

The scope of the subject merchandise includes certain grades of "redraw hollows" that are also used as a material to produce cold-finished CSSSHP. As a result, some U.S. cold-finished CSSSHP producers purchase redraw hollows from Japanese producers and/or other U.S. producers. *See* Staff Report at V–7 (Products 8 and 9), and III–6.[2] The Staff Report explains that U.S. producers purchase CSSSHP raw materials, including "billets, bars, and/or redraw hollows, in order to supplement product lines, or because product types were not domestically available." Staff Report at III–6.[3]

The Japanese Producers claim that the Commission understated domestic production by excluding *domestic* shipments of redraw hollows

---

[1] The court notes that the appointment of Chairman Devaney is at issue in other cases before the court, including *Nippon Steel Corp. v. United States*, Consol. Court No. 01–00103, Slip Op. 01–153 (Ct. Int'l Trade Dec. 28, 2001), in which discovery has been granted as to the timing of the President Clinton's actions with respect to Mr. Devaney's appointment.

[2] The Staff Report at I–15 explains how product specifications dictate whether redraw hollows are considered upstream articles or end-products as follows:

> [C]old-finished CSSSHP are downstream products, and redraw hollows, which are particular hot-finished and cold-finished CSSSHP, are the upstream or intermediate product. Hot-finished CSSSHP have many uses independent from the production of cold-finished CSSSHP. Such uses include pipe, tubing, and hollow bar. Many specifications, particularly those for pipe, allow the use of either hot-finished or cold-finished product at the option of the manufacturer, thereby making the choice dependent upon the specific manufacturing capabilities of the manufacturer.

[3] The Staff Report indicates that [ ]. Staff Report at V–23 to 24 (footnote omitted).

from its calculation of domestic consumption, without making a similar adjustment for *imported* redraw hollows. The Japanese Producers emphasize that purchases of subject imports by U.S. producers, which constitute the bulk of the increase in volume, actually benefitted the U.S. industry. The Commission responds that "when the ITC presents U.S. data for a single domestic like product that includes two articles at different levels of production, it excludes sales/purchases of the upstream article (here, redraw hollows) destined for use in the downstream article (here, CSSSHP), to avoid double counting." ITC Br. at 19. The Commission further explains that it does not exclude upstream imports that are subject products from the import side, because they are within the scope of the product subject to investigation, and the Commission tries to "capture" all subject merchandise.

The Commission's methodology of excluding only domestic shipments of redraw hollow is reasonable. Exclusion of sales by domestic producers to other domestic producers is warranted in calculating apparent domestic consumption because the volume corresponding to those particular sales ultimately will be accounted for when the purchasing U.S. producers report their sales of the further finished products to end-users. Such exclusion does not, as the Japanese Producers contend, "understate" U.S. production, as an upstream good is not "produced" a second time when it is finished for resale. In contrast, inclusion of purchases of Japanese imports by U.S. producers bears no such risk of double counting, as there is no initial domestic sale of a good that will be resold in the U.S. Excluding purchases of Japanese redraw hollows by U.S. producers simply because such purchases "benefit" the U.S. producers in some way would distort the amount that U.S. purchasers of CSSSHP actually consume. Similarly, a more accurate calculation would not result from counting initial purchases of U.S.-manufactured redraw hollows and counting them once again when such products are refinished and resold. Accordingly, there is no basis for requiring the Commission to exclude from apparent domestic consumption the volume of subject merchandise purchased by U.S. producers from Japanese producers.[4]

B. Conditions of Competition

In *Altx I*, the court reviewed the original Commission majority's determination that subject import volume was not significant, which had

[4] The court in *Altx I* had rejected the Domestic Producers' argument that the Commission was required to consider only the condition of those domestic producers that do not import subject merchandise. *See Altx I* at 1370. The court reasoned that "[a]lthough one segment of the industry may benefit from dumping while another segment is harmed, the statute does not permit the ITC to manipulate its material injury analysis in favor of petitioners by focusing exclusively on the segment of the defined industry that is harmed." *Id.* The court emphasized that although the Commission is permitted to exclude from the domestic industry "a producer of the domestic like product [that] is also an importer of the subject merchandise," *see* 19 U.S.C. § 1677(4)(B), this exclusion occurs at the earlier stage of the Commission's analysis in which the Commission defines the domestic industry. The reasoning in *Altx I* applies here as well, as the Commission is similarly barred from manipulating its material injury analysis in favor of respondents by artificially reducing the volume of subject imports consumed according to a perceived "benefit" accruing to certain purchasing producers. That the Commission has chosen to include within the scope of the domestic industry the U.S. producers that purchase subject merchandise does not preclude it from making an adjustment for double-counting. To the extent that the purchase of subject imports by U.S. producers constituted a "benefit," such benefit necessarily would be reflected in the domestic industry's overall performance. The Commission also may examine these matters in the context of conditions of competition in order to assess causation.

been based in part on a finding of attenuated competition between the subject imports and the domestic like product. The court held that the Commission's finding of attenuated competition was supported by substantial evidence, namely, the "inability of the domestic industry to satisfy an increasing range of categories of subject merchandise," which according to the Commission may have been exacerbated by the bankruptcy of a significant domestic manufacturer, ALTech.[5]

The Japanese Producers assert that the Commission lacks substantial support for its conclusions regarding: (1) the degree of substitutability between subject imports and domestic production, and (2) the ability of the domestic industry to respond to changes in demand. According to the Japanese Producers, a proper assessment of the nature and extent of competition would preclude a determination that subject import volume is significant. The court finds that although the Commission's subsidiary findings with respect to conditions of competition are supported by substantial evidence, the Commission has not complied with its statutory obligation to determine the significance of subject import volume *in terms of* those findings.

1. Substitutability

The Japanese Producers argue that the new Commission majority "misstated" the competitive overlap between subject imports and domestic production as having "high substitutability" because it failed to consider certain limitations on competition in certain product sizes and types. Specifically, the Japanese Producers maintain that the Commission's assessment of competitive overlap did not adequately address its contentions regarding the limitations on domestic sources of supply, namely: (1) after the bankruptcy of ALTech, there were no viable domestic sources of hot-finished CSSSHP in the 3″–6″ outside diameter ("O.D.") range; (2) independent cold-finishers do not purchase from PEXCO, the only remaining U.S. producer of redraw hollows, on account of its affiliation with their main competitor, Sandvik; (3) major boiler manufacturers had no "qualified" domestic source of supply for hot-finished boiler tubes; (4) cold-finished subject imports are "annealed and pickled" while U.S. product is largely "bright annealed," for which purchasers pay a premium; and (5) International Extruded (or "IXP"), the only U.S. mill able to produce large diameter CSSSHP (i.e., 8″ O.D. and up), was not active in the market below 10″ O.D.[6] Japanese Producers conclude that the limitations on the overlap in competition,

---

[5] The court's reasoning in *Altx I* was as follows:

> First, between 1997 and 1999, the percentage range of subject imports for which there was no competition from the domestic industry increased over 50%, showing the domestic industry becoming significantly less competitive with subject imports over the [period of investigation]. Questionnaire responses indicating that domestic sources were unable to satisfy purchasers' requirements further corroborate this trend. Second, the bankruptcy of a significant domestic manufacturer may have amplified this trend. In 1997, ALTech Specialty Steel Corp. ("ALTech"), a domestic producer, went bankrupt and then ceased production of hollow products. To compensate, purchasers, including one that had relied on ALTech for 75 percent of its annual requirement of a certain product, were forced to seek alternative suppliers, including Japanese producers. Thus, between 1997 and 1998, this singular event further reduced the domestic industry's competitiveness with subject imports.

Altx I, at 1363–64 (citations omitted).

[6] The Japanese Producers emphasize that [ ].

combined with the acknowledged portion of the subject merchandise not produced by the domestic industry, substantially undermine the Commission's determinations that subject import volume during the period of investigation ("POI") was significant.

The Japanese Producers omit that the new Commission majority affirmed its previous *overall* determination that there is "at least a *moderate* level of substitutability" between subject imports and the domestic like product with respect to CSSSHP overall. Remand Determination at 29. The Commission first found that although subject imports and the domestic like product are generally considered interchangeable by "market participants," purchasers did identify several relative strengths and weaknesses in their sourcing decisions. *Id.* The Commission noted that Japanese hollow products were dominant in the categories of "lowest price" and "broadest product range" while U.S. hollow products were considered superior in delivery time. *Id.* (comparing Table II–1 to Tables II– 2 and II– 3).

The Commission then specified that "[o]verall, for a range of subject imports—approximately 80 percent [of total subject imports] in 1999—there is a *high* degree of substitutability with the domestic like product." Remand Determination at 29–30 (citing Staff Report at II–23 and Table I–2).[7] The Commission recognized, however, that "there is a portion of the market in certain sizes and pursuant to chemistry requirements that the domestic producers are unable to supply." Remand Determination at 30 (citing Staff Report at II–26). The Commission majority described certain industry characteristics that account for this domestic coverage shortfall. *Id.* at 30 n.13 (citing Staff Report at II–26 to 27).

Thus, it is clear that the Commission's overall determination that there is "at least a moderate level of substitutability" between the subject imports and the domestic like product strikes a balance between: (1) the finding that there was a lack of viable sources for a significant portion of the market, and (2) the finding that for the rest of the market, purchasers generally consider U.S. and Japanese sources interchangeable, i.e., substitutable. The word "moderate" includes the concept of "attenuated," and thus the Commission likely is recognizing that competition overall is attenuated to a certain extent. The inclusion of "at least" likely indicates that the Commission believes that competition is only *slightly attenuated,* rather than so attenuated as to preclude an affirmative injury determination.

With respect to the former finding regarding viability of domestic supply, there is no indication that the Commission limited its estimation of the percent of the market not produced by the domestic industry to only

---

[7] The Staff Report indicates that:

> Based on available data, staff believes that there is a high degree of substitution between domestic and imported CSSSHP from Japan for a range of hot-finished and cold-finished products. For a second range of products, however (smaller than the first overall—how much smaller is a matter of dispute), domestic suppliers do not provide strong alternatives to Japanese imports, if they are produced at all in the United States. This range appears to have more market significance for hot-finished products than for cold.

Staff Report at II–23.

those product types the domestic producers *cannot* produce. Rather, it is clear that the Commission considered what the domestic producers actually *do* or do not produce. The Commission's description of a domestic coverage shortfall is based on the evidence detailed in the Staff Report which parallels the practical limitations cited by the Japanese Producers. The Commission stated:

> Domestic Producers are unable to produce hollow products in certain size categories, although the exact size range is in dispute. It appears, however, that U.S. capability is lacking in the range from 3 inches to 8 or 10 inches in outside diameter. Staff Report at II–26. PEXCO [ ]. PEXCO's Producer Questionnaire Response, Section II–15. International Extruded can produce down to 6 or 8 inch outside diameters, but apparently does not actively seek general business below 10 inches because of the inefficiency of its press in such sizes. Staff Report at II–16 n.50. In addition, American Extruded and ALTech have not always been viewed as viable suppliers. Staff Report at II–27.

Remand Determination at 30 n.13.[8] Thus, the Commission considered and relied on evidence detailed in the Staff Report that generally accepts the Japanese Producer's view of the practical limitations on domestic sources of supply, and made its viability determination accordingly, but ultimately determined that the limitations were not so extensive as to undermine a finding of significant subject import volume.

Staff Report Table I–2, also relied upon by the Commission, indicates that, expressed as a ratio of total imports, the percentage of the CSSSHP market not available from domestic sources ranged from 11.0% in 1997, 19.7% in 1998, and 18.7% in 1999. Staff Report at I–12. This data was based on purchaser questionnaire responses, which undoubtedly took into consideration the practical limitations on what the U.S. producers *actually* do supply. *See* Staff Report at II–26 n.45 (indicating that several of the purchaser questionnaire responses emphasized domestic deficiencies). There is no evidence that the purchasers limited their responses to their perceptions of what the domestic industry was *capable* of producing. In any event, the court finds the exact percentage is immaterial, as the Japanese Producers do not dispute that, as the Staff Report

---

[8] The Staff Report first noted evidence that supported a finding of viability—i.e., that there are domestic hot-finishers "actively seeking business in sizes up to 6 inches and above 10 inches"—but apparently called into question the practical limitations on this effort. Staff Report at II–27 n.50. After acknowledging that "International Extruded, an extruder specializing in the largest sizes (and temporarily out of the market at present) can apparently produce down to 6 or 8 inch outside diameters," the Staff Report indicated that "a number of firms have stated that [ ] does not actively seek general business below 10 inches because of the inefficiency of its press in such sizes."

The Staff Report then discussed other evidence supporting claims of coverage shortfall, noting that it is "well documented domestic capability in the 3 inch to 6 inch range is suspect in the eyes of many purchasers and others in the industry." *Id.* As support for this statement, the Staff Report specified that: (1) American Extruded is not always viewed as a viable supplier; and (2) "[q]uestions still linger * * * about the effects of the ALTech bankruptcy and the extent to which ALTX will be able to improve the competitive position at those facilities." Staff Report at II–27. The Staff Report also recognized that on balance purchasers are willing to pay a premium for "bright annealing." *Id.* Lastly, the Staff Report specifically indicates that its conclusions regarding substitutability took into consideration that domestic redraw hollow purchasers "[ ]" Staff Report at II–28.

found, the range of products for which there is no viable U.S. source is smaller than the remaining segment of the market.[9]

With respect to the latter finding of substitutability for the remaining segment of the market (i.e., the segment of the market the domestic industry is practically able to supply), the Commission based its determination of "high degree of substitutability" on the recognized interchangeability of hollow products from the U.S. and Japan in terms of product characteristics. *See* Staff Report at I–10 ("Petitioners and respondents agree that Japanese product is interchangeable with U.S.-produced product."). The Staff Report explained the interchangeability in terms of product specifications as follows:

> A significant number of CSSSHP are produced to well-known specifications. For firms purchasing these products, there may be little or no physical difference whether the product originates in the United States or Japan. Other purchasers demand products produced to stricter specifications, ones which some producers may have difficulty meeting (as was testified to be the case for super-hot-finished boiler tubing, which was reported to be available from Japan but not the United States).

Staff Report at II–25.

The Commission also based its assessment of substitutability on purchaser comparisons of product features. Remand Determination at 29 n.11 (comparing Tables II–1 with Tables II–2 and II–3). Table II–1 indicates that 58 percent of responding purchasers deemed "product range" a "very important" product feature in decision-making. Table II–2 shows that purchasers deemed U.S. and Japanese sources of hot-finished "comparable" for 11 out of 14 categories. The only product features the purchasers deemed one country or the other superior were: "delivery time" (U.S. superior); "lowest price" (Japan superior); and "product range" (Japan superior). Table II–3 shows a similar breakdown of purchaser comparisons for cold-finished CSSSHP. The Japanese Producers do not dispute the accuracy of purchaser assessments. Indeed, the purchasers' assessment that Japan is superior in product range comports with the Japanese Producers' characterization of the domestic coverage shortfall. Therefore, the Commission's subsidiary finding that there is a high degree of substitutability is supported by substantial evidence. The Commission's ultimate conclusion that there is "at least a moderate level of substitutability" reflects the diminished overlap in competition resulting from the practical limitations described above in light of the recognized interchangeability for the rest of the market.

2. Responsiveness of the Domestic Industry

The Japanese Producers contend that the new Commission majority overstated the ability of U.S. producers to shift supply in response to

---

[9] Indeed, the Staff Report acknowledged deficiencies in the data in Table I-2 reflecting purchaser questionnaire responses regarding the percentage of purchases unavailable domestically. *See* Staff Report at II–26 n.45 (noting that "responses * * * were too sparse to enable an overall percentage to be calculated.").

changes in the U.S. market. The Japanese Producers maintain that the Commission's analysis took no account of practical limitations on the ability of domestic producers to meet an increase in demand. These limitations involve the domestic coverage shortfall and the effect of foreign affiliates described above. The Japanese Producers concede that the Commission recognized these limitations, but maintains that it "ignores their implications." The Japanese Producers' argument lacks merit.

On remand, the Commission found that U.S. producers had "*considerable* ability to shift supply" to react to changes in market conditions based on the following findings: (1) there was a high level of industry exports;[10] (2) domestic producers maintained high levels of inventory;[11] (3) other products are produced on the same equipment used to produce CSSSHP; (4) there is "substantial excess capacity" among domestic producers. In finding that "the domestic industry has substantial available capacity to produce CSSSHP," however, the Commission noted that:

> at no time during the period examined * * * did [the domestic industry] have sufficient hot-finishing or cold-finishing capacity to supply the *entire* domestic demand in either market segment. These overall capacity limitations, as well as product-specific constraints discussed [in its analysis of substitutability], *moderate* the domestic industry's ability to respond to changes in U.S. market conditions.

Remand Determination at 29 (emphasis added). Although the Commission failed to indicate the sources for its findings, the Commission's analysis of these various factors parallels various factors identified in the Staff Report as affecting the responsiveness of the domestic industry to changes in demand. The Staff Report described these factors are as follows:

> Factors that tend to raise the degree of responsiveness of supply are the availability of unused capacity (especially for the production of cold-finished CSSSHP) and a (much more limited) ability to transfer resources from the production of alternative products to the production of CSSSHP. Factors that would reduce the supply responsiveness are production rationalization on the part of multinational groups with which some suppliers are affiliated and, to some degree, the size range limitations of domestic producers.

Staff Report at II–11. Thus, the Commission recognized that the domestic industry was incapable of supplying every product size and type imported by U.S. purchasers, referencing the reasons detailed in its substitutability analysis, but ultimately concluded that the other factors listed above outweighed this fact. That the Commission characterized the degree of responsiveness of the domestic industry as

[10] The Commission stated that: "Fully one-quarter of the domestic industry's total shipments in 1999 were exports (one-third with respect to hot-finished hollow products only)." Remand Determination at 28–29. The Japanese Producers contend that international affiliation explains the high level of exports among domestic producers, but does not address why, notwithstanding these affiliations, these exports could not be redirected to meet increases in domestic demand.

[11] The Commission stated that: "U.S. producers maintained inventories (primarily of cold-finished hollow products) equivalent to nearly one-fifth of their total shipments in 1999." Remand Determination at 29.

"considerable" ("rather large in extent or degree") reflects this weighing of factors. The court declines the Japanese Producers' invitation to second-guess the weight the Commission chose to assign various criteria in analyzing the responsiveness of the domestic industry.

C. Significance of Subject Import Volume

That the Commission's findings with respect to certain conditions of competition are supported by substantial evidence, however, does not necessarily mean that its conclusion that subject import volume is significant is likewise supported.

On remand, the new Commission majority determined that the volume of subject imports was significant both in absolute terms and relative to production or consumption in the United States.[12] The Commission further found that while U.S. consumption increased by 10.9 percent over the POI, the quantity of subject imports increased over this period by 26.8 percent, while the domestic industry's U.S. shipments decreased by 16.8 percent and imports from all other countries combined increased by 23.8 percent. Lastly, the Commission noted that "the market share of imports of the subject merchandise from Japan increased by 3.4 percentage points, the domestic industry's market share decreased by 8.4 percentage points, and nonsubject imports' market shares increased by 4.9 percentage points." *Id.* at 32.

The Commission concluded that the volume of subject imports was significant without discussing subject import volume in relation to its findings with respect to the conditions of competition. The Commission failed to analyze whether the increase in volume and market share of subject imports corresponds, in whole or in part, to that portion of the market recognized by the Commission as not supplied by the domestic industry (either because of incapability or lack of viability). Specifically, the Commission did not indicate any evidence from which the court may discern whether the increases in volume of subject imports it deemed significant (in particular, the spike in imports from 1997 to 1998) can be attributed to product types or size ranges not produced by the domestic industry. If, as the Commission seems to have conceded, there is a sizeable portion of the market for which the domestic industry does not compete, naturally, the Commission must determine if subject imports are concentrated there. Similarly, the significance of subject import volume would be substantially diminished if the increase in subject imports

[12] In absolute terms, the Commission found that the quantity of subject imports increased by 95.6 percent from 1997 to 1998, and that "[b]y 1998, the volume of imports of the subject merchandise from Japan surpassed the total shipment volume of the domestic industry and rivaled the volume of imports from all other sources *combined*." Remand Determination at 31. The Commission acknowledged that the quantity of subject imports decreased from 1998 to 1999, but noted that "the quantity of subject imports remained greater than the U.S. shipments of the domestic industry in 1999." *Id.*

is primarily or entirely in the range of product types not produced by the domestic industry.[13]

On the other hand, subject import volume might still be significant if, for example, the product range unavailable from domestic sources corresponds to only a small percentage of the

total increase in subject import volume, or if the bulk of the increase in subject imports can be attributed to product types in which there is intense competition. Similarly, an affirmative significance determination would be supported by a finding that the volume of Japanese imports of products competing directly with the domestic like product increased, while products not produced by U.S. producers declined or remained constant. Japanese production of hot-finished CSSSHP appears to be concentrated in A–312 pipe, while U.S. production is concentrated in redraw hollows. *See* Staff Report at I–11. The Japanese industry acknowledges, however, that redraw hollows accounted for the bulk of the increase in subject imports over the POI.[14] Nevertheless, it is for the Commission, not the court, to track subject import volume levels over the POI in relation to domestic production, with particular attention to the products accounting for substantial fluctuations thereof.

The Commission argues that it is sufficient that the domestic industry is *capable* of producing a particular product type, even if for practical considerations it does not produce it in any significant quantity. The Commission states that (1) Altx was "reasonably expected to become as important a supplier as ALTech had been," and (2) that "[w]hile AEP [i.e., American Extruded] may not always be viewed as a viable supplier, Altx supplies CSSSHP in the same size range as AEP, and IXP is also capable of manufacturing products in that range." First, a theoretical possibility of future production says nothing about the extent to which U.S. and Japanese producers actually compete in specific product types or size ranges. Nor does the potential for future viability have any meaning that would bear on the significance of actual subject import volume, or increases thereof, for the purpose of determining present material injury, as opposed to threat of material injury. Second, the Commission majority did not base its characterization of the competitive overlap on the potential to produce certain product sizes in the future, but on purchaser perceptions of the comparability of U.S. and Japanese sources for most product features. The court therefore rejects these *post hoc* rationalizations of the agency's determination. *See Ta Chen Stainless Steel*

---

[13] For example, the domestic industry experienced a decrease in production from 13,177 short tons in 1997 to 11,827 in 1998, a difference of 1,350 short tons. This decrease was outstripped by an increase in subject imports of Pipe 312/304 >3" from 565 short tons in 1997 to 2160 short tons in 1998. Domestic production of this product, however, was 9 short tons in 1997 and 1 short ton in 1998. It appears, however, that the Commission determined that the domestic sources for this product were not viable, thereby diminishing the significance of the increase in subject import volume of this product.

[14] The Commission could determine that the domestic sources for a particular product were viable, as is apparently the case for Hollows: OD<3". Domestic production of this product went from 4,006 short tons in 1997 to 4,477 short tons in 1998. Subject imports of this product increased from 596 short tons in 1997 to 2,288 short tons in 1998. Thus, the significance of this increase in volume is more significant than if domestic production of this product were not viable. The Japanese Producers themselves indicate that imports of redraw hollow from Japan accounted for [ ] of the total increase in subject import volume over the POI. Def.-Int. Br. at 18.

Pipe, Ltd. v. United States, No. 99–07–00446, Slip Op. 01–101, at 9–10 (Ct. Int'l Trade Aug. 14, 2001).

The Commission has made no findings that would enable the court to discern its reasoning in concluding that volume of subject imports are significant notwithstanding the substantial and increasing portion of the market for which there is no viable domestic source of supply. The statute indicates that "[t]he Commission shall evaluate all relevant economic factors [i.e., subject import volume, price effects, and the impact on the domestic industry] within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C). The Commission does not comply with its statutory mandate by simply describing various conditions of competition in isolation. "Congress, this court, and ITC itself have repeatedly recognized that it is the *significance* of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7)." *USX Corp. v. United States*, 11 CIT 82, 85, 655 F. Supp. 487, 490 (1987) (citing *Atlantic Sugar, Ltd. v. United States*, 2 CIT 18, 23, 519 F. Supp. 916, 921–22 (1981)). "[F]or the Commission's findings under 1677(7)(C)(i) to be supported by substantial evidence, the Commission must analyze the volume and market share data in the context of the conditions of competition" to determine if subject import volume is significant. *Nippon Steel Corp. v. United States*, 2001 CIT 154, 159, 182 F. Supp. 2d 1330, 1335 (2001). Therefore, on remand, the Commission shall analyze the significance of subject import volume in terms of product types available and practically unavailable from U.S. sources during the POI, and, to the extent possible, group the data on viability of domestic sources in a manner that reflects the actual limitations.

In addition, the Commission has not met its burden of explaining displacement by subject import volume in terms of increasing domestic consumption. Total U.S. consumption need not in all cases be in decline for an increase in the volume of subject imports to be significant. *Nippon*, 182 F. Supp. 2d at 1335. This is not to say, however, that the Commission is absolved of *explaining* why subject import volume, or increases thereof, are significant notwithstanding an increase in total consumption. As the court noted in *Nippon*, subject import volume may be considered significant "where U.S. consumption is stable or even increasing, *depending on other market indicators that speak to such displacement.*" *Id.* at 1337 (emphasis added). Naturally, if the increase in domestic consumption outstrips the increase in subject import volume, the decrease in domestic market share would be less indicative of injury. In this case, the Commission does not explain, as it must on remand, whether the increase in domestic consumption corresponds, in whole or in part, to the product range not produced by the domestic industry.

II. Price Effects

Under 19 U.S.C. § 1677(7)(C)(ii), "[i]n evaluating the effect of imports of subject merchandise on prices, the Commission shall consider whether (I) there has been significant price underselling by the imported mer-

chandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree."

On remand, the new Commission majority determined that prices for the domestic like product and the subject imports "generally fell" over the POI. Remand Determination at 32. The Commission also found, and the Japanese Producers do not dispute, that the data showed that Japanese producers of both hot-finished and cold-finished CSSSHP undersold the domestic industry in a majority of instances over the POI. *Id.* at 32–33.[15]

The Japanese Producers claim that: (A) the pricing data on which the Remand Determination relies is "sparse" and not representative of the industry as a whole; (B) there is no correlation between underselling and the condition of the domestic industry; (C) record data do not show price suppression or depression; and (D) other factors explain the drop in domestic CSSSHP prices.

A. Data Sample

In the Remand Determination, the Commission admitted the limited nature of the data,[16] indicating that the pricing information it relied upon accounted for 1% to 4%[17] of sales of coldfinished CSSSHP, and 7% of hot-finished. *Id.* at 34. The Commission noted, however, that the data were "broadly representative of the overall market environment." The Japanese Producers argue that the pricing data obtained by the Commission covers only a "mere fraction" of the CSSSHP market and therefore cannot serve as a basis for an analysis of general trends.

The Commission is not precluded from relying on available pricing data simply because the pricing data does not encompass the entire or even a majority portion of the market. Nevertheless, if the data sample is admittedly small, as here, the court must examine the Commission's reasons for finding the data representative of the entire market. In this case, the court finds that Commission's use of the data is reasonable and its assessment that the data were "broadly representative" is supported by substantial evidence.

---

[15] The Commission's findings are as follows:

> In the majority of instances in which the domestic and Japanese prices could be compared, the Japanese product was sold in the U.S. market for a price lower than the domestic price. Notably, underselling occurred most frequently in 1998 and 1999. In 1997, the Japanese hot-finished stainless hollow products undersold the domestic like product in 7 of 13 instances. However, in 1998 (when the increase in the volume of subject imports was the greatest) and in 1999, the Japanese product undersold the domestic product in 25 of 31 instances. In the first quarter of 2000, after the petition was filed and prices for the Japanese product increased, the degree of underselling decreased. With respect to cold-finished CSSSHP, prices for both U.S-produced and Japanese CSSSHP declined over the period, and reached low points in 1999. In 31 of 39 instances in which the prices of cold-finished CSSSHP produced in the United States and in Japan could be compared, the Japanese product undersold the domestic like product.

Remand Determination at 33. *See also* Staff Report at V–24 ("There is broad (but not universal) price underselling on the part of Japanese products, at margins of up to about [ ] in some cases.")

[16] In its Brief, the Commission explains that "pricing data were limited for most of the products, in part because of the wide range of specification possibilities for CSSSHP. In addition, some domestic producers specialize in less common CSSSHP specifications, so there was little or no production of the relatively generic products for which pricing data were sought." ITC Br. at 23.

[17] The Staff Report indicates that the data sample represents 0.3 to 3.9% of cold-finished hollow products sales in the United States and imported from Japan. *See* Staff Report at V–8.

The Staff Report explains that the Commission originally had solicited price information with respect to nine products of specific average wall thickness and outside diameter. Staff Report at V–6. These products included two types of hot-finished pipe, three types of coldfinished tube, two types of hollow bar, and two types of redraw hollow. *Id.* The Japanese Producers do not dispute that the products selected were "relatively generic products" or "standardized products." *See* Staff Report at V–22 to 23. Because the data provided in response to the original solicitation were "sparse," however, the Commission expanded the definitions of the products by increasing the acceptable range of average wall thicknesses and, for each redraw hollow product, increased the acceptable range of outside diameters. *See id.* at V–7. The Commission notes, and the Japanese Producers do not deny, that "Sumitomo was given the opportunity to comment on the questionnaires and thus had the chance to propose other pricing products," and that it "specifically asked for four additional pricing products [but] Sumitomo provided only refinements to the pricing products proposed in the draft questionnaires." The Staff Report indicates that the Commission received useable pricing data from ten U.S. producers, thirteen importers, and fourteen purchasers, and calculated weighted-average prices for each product. *See id.* at V–7, 9 to 22.

The Staff Report notes that the additional pricing data improved coverage moderately, but characterizes the resulting pricing data coverage as still "relatively sparse * * * in part because of the wide range of specification possibilities for CSSSHP" and because "a few of the domestic producing firms specialize in less common CSSSHP specifications. For these firms, there was little or no production of the relatively generic products for which pricing was obtained." *Id.* at V–22. The Japanese Producers neither dispute the accuracy of these explanations for the paucity of useable data, nor present any alternative method or data sample from which the Commission could determine more accurately the extent of underselling.

Furthermore, recognizing the limited coverage of its data sample, the Commission sought to bolster its findings of underselling by checking pricing trends against another set of data. In the Remand Determination, the Commission indicated that its findings based on the data sample were consistent with its analysis of product groups, whereby it concluded that Japanese hollow products undersold U.S. hollow products "over the entire range of products in which they compete: in 34 of 51 observations for hot-finished hollows and 35 of 37 observations for cold-finished hollows." Remand Determination at 34 (citing Table E–3). Table E–3 compares "U.S. producers' U.S. shipments" to "U.S. shipments of imports," arranging the data for which by product categories. The Table does not reflect prices for individual sales, but the Commission noted that the data "reflect the steep decline in average unit values across a broad spectrum of products." *Id.* at 34 n.32. Thus, the Commission relied on product group pricing data in terms of average unit values

as *supplementary* support of its analysis based on the sparse pricing data, rather than a *substitute* therefor.

Accordingly, the court finds that the Commission's use of pricing data for the nine selected products as defined was reasonable and supported by substantial evidence.

B. Correlation between Underselling and Industry Performance

In *Altx I,* the court indicated that "[e]vidence of consistent underselling that occurs while the domestic industry is performing favorably may reasonably undercut the significance attributed to underselling." 167 F. Supp. 2d at 1366 (citing *Coalition for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States,* 15 F. Supp. 2d 918, 925 (Ct. Int'l Trade 1998)). The court remanded on this issue, however, as the Commission did not adequately evaluate, *inter alia,* the Plaintiffs' argument that the Commission's use of yearly data may have masked the true health of the domestic industry. *Id.*

The court finds that the new Commission majority similarly failed to address the relevant and material arguments made by the Japanese Producers. *See* Statement of Administrative Action, accompanying H.R. Rep. No. 103–826(I), at 892, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4216 ("SAA") (under 19 U.S.C. § 1677f(i), "the agencies must specifically reference in their determinations factors and arguments that are material and relevant, or must provide a discussion or explanation in the determination that renders evident the agency's treatment of a factor or argument.").

In the Remand Determination, the Commission described its underselling findings as follows:

> In 1997, the Japanese hot-finished stainless hollow products undersold the domestic like product in 7 of 13 instances. However, in 1998 (when the increase in the volume of subject imports was the greatest) and in 1999, the Japanese product undersold the domestic product in 25 of 31 instances. In the first quarter of 2000, after the petition was filed and prices for the Japanese product increased, the degree of underselling decreased. With respect to cold-finished CSSSHP, prices for both U.S.-produced and Japanese CSSSHP declined over the period, and reached low points in 1999. In 31 of 39 instances in which the prices of coldfinished CSSSHP produced in the United States and in Japan could be compared, the Japanese product undersold the domestic like product.

Remand Determination at 33. Japanese Producers claim that even if the use of the data sample were proper, the Commission did not address their argument that the pricing data do not demonstrate a correlation between underselling and the condition of the domestic industry. The Japanese Producers maintain that the Commission found that the frequency of underselling was high in 1998, but ignored that the domestic injury had a "banner year" in 1998, while 1999 showed a similar frequency of underselling but diminished performance from the previous year.

The Commission does not assert that it attempted to correlate underselling with market indicators specified by the Japanese Producers. Rather, the Commission responds that the court in *Altx I* stated that "the significance of underselling * * * depends on the particulars of the product and industry at issue," and that, given the sparse data, the fact that underselling occurred in "so many of available comparisons" is itself significant. ITC Br. at 24–25. The court finds the Commission's reasons for its failure to examine whether its findings of underselling correlate to trends in the health of the industry are inadequate.[18]

That there was frequent underselling during the POI does not necessarily mean that underselling was the *source* of injury. The overall frequency of underselling by itself says nothing about causation, and does not absolve the Commission of its obligation to analyze underselling in terms of trends in the domestic industry's performance. *See Altx I*, 167 F. Supp. 2d at 1366 ("Section 1677(7)(C)(ii) requires the Commission to undertake two distinct analyses to examine (1) the significance of underselling and (2) the causal connection between subject imports and price depression and/or suppression."). Naturally, a finding that U.S. market indicators were improving in periods of intense and/or consistent underselling may undermine a finding that subject imports caused injury to the domestic industry. *See id.* (citing *Coalition*, 15 F. Supp. 2d at 925). Conversely, deteriorating domestic performance in the face of intense underselling tends to support a determination of a causal connection. Therefore, the Commission must attempt to track its yearly (or more frequent) data on underselling to yearly (or more frequent) data on health indicators of the domestic industry.

C. Price Depression and Suppression

The Commission found that "the persistent underselling and aggressive pricing" and the "declining domestic prices during the period examined" demonstrated that the high volume of subject imports suppressed and depressed domestic prices. Remand Determination at 34–35. Japanese Producers claim that the data do not show price depression or suppression because: (1) there is no evidence of a causal connection between domestic prices and subject import prices; and (2) the record evidence belies the ITC's conclusions of Japanese price leadership.

1. Correlation between Subject Import Prices and Domestic Prices

The new Commission majority found that prices for both the domestic like product and the subject imports "generally fell" over the POI. The Remand Determination then indicates that domestic prices of hot-finished CSSSHP—namely, ASTM A–312 pipe (products 1 and 2), hollow bars (products 6 and 7), and redraw hollows (products 8 and 9—"declined irregularly," and notes a "similar trend" for Japanese prices, "al-

[18] The Domestic Producers state that the Commission found that the domestic industry "suffered intense difficulties in the second half of 1998 and the first half of 1999," which is when the Commission found that subject imports' underselling was the greatest and their prices were lowest. The Commission, however, made no findings with respect to incidence of underselling on a semi-annual basis that would reveal such a correlation.

though with a more distinct upturn in the first quarter of 2000, following the filing of the petition." Remand Determination at 32. The Commission did not specify pricing trends for cold-finished tube (products 4 and 5).[19]

The Japanese Producers first argue that the Commission found decreased underselling in the first quarter of 2000, but also found that domestic prices did not recover in early 2000. The court finds no disconnect in the Commission's findings as the Japanese Producers allege. As underselling was still found to be occurring in the first quarter of 2000, regardless of any change in the incidence thereof, it is not inconsistent that the domestic pricing did not show signs of recovery in this period.

The Japanese Producers next claim that the data on a product-by-product basis is not conclusive. They allege that domestic pricing for products 1, 2, 3 and 5 either remained constant while Japanese pricing changed significantly, or fluctuated over the POI in a manner inconsistent with fluctuations in Japanese pricing. They do not address changes in pricing for the other products. The Japanese Producers concede that the data for products 3, 4, 5 and 9 generally shows underselling. Sumitomo Br. at 23 n.21. For the remainder of the products, however, they contend that there was either more prevalent overselling (products 2, 7 and 8) or insignificant underselling (product 5). *Id.*

The Commission responds that "the fact that some overselling exists and that pricing anomalies can be gleaned from the various pricing series does not undermine the general correlation between the domestic pricing declines and the declining prices of Japanese CSSSHP. It is true that the Commission need not find an exact correlation between subject import pricing and domestic pricing. Nevertheless, the Commission's cursory look at general net declines over the POI is insufficient. Where the decline in pricing is admittedly "irregular," the Commission must track domestic pricing with subject import pricing on a year-to-year basis, if not on a semi-annual or quarterly basis, depending on the availability of data. Therefore, on remand, the Commission shall reevaluate its findings with respect to price correlation in light of the concerns raised by the Japanese Producers.

2. Price Leadership

The Japanese Producers maintain that the Commission's finding that "several [firms] identified Sanyo and Sumitomo as price leaders" is misleading, as the Staff Report, read in context reveals contradictory ev-

---

[19] The Commission's findings are generally consistent with the Staff Report's explanation of pricing trends:

> In general, the prices for the products examined fell over the period at issue, although not necessarily by the same amount for all products. Additionally, prices of CSSSHP imported from Japan fell slightly more than those for U.S.-produced product during this time. There is broad (but not universal) price underselling on the part of Japanese products, at margins of up to about [ ] in some cases.

Staff Report at V-24 (note omitted).

idence regarding price leadership. The Staff Report reads in pertinent part as follows:

> Some firms suggested that there are really no price leaders in the market for CSSSHP. * * * Other firms suggest that price leadership exists, but is diffused among several of the largest firms, including Sandvik, Sumitomo Metal, Tubacex, DMV, Sanyo, and others. * * * A third view is that only the strongest of these firms are true price leaders. In this context, Sandvik is often mentioned, especially over the period examined.

Staff Report at II–10.

While the Commission "may not * * * ignore a Staff Report analysis that contradicts [its own]" which is relied upon by the parties, *Altx I*, 167 F. Supp. 2d at 1359–60, it is within its discretion to choose which is the most credible among conflicting testimony. Its decision to cite the Japanese leaders is understandable, given the evidence relating to Japanese pricing as generally lower than domestic pricing.[20] Further, the Commission did not state that other firms were *not* price leaders, only that Sumitomo and Sanyo were identified as price leaders. The producers of subject imports need not be found to be the only recognized price leaders to support a finding of price suppression and/or depression. The court finds that although the Commission's phraseology was somewhat misleading, there is insufficient reason to reject the Commission's conclusion.

D. Alternative Causes for Decline in U.S. Pricing: Declining Input Costs

The Japanese Producers maintain that the Commission lacked a proper basis for dismissing their argument that the decline in hollow products pricing is more properly attributed to the decline in input prices. On remand, the Commission recognized that "input costs are an important component of price," but found that while the price of nickel dropped in 1997 and 1998, and "completely reversed in 1999 and early 2000," domestic prices continued to decline "for virtually all grades and types of CSSSHP * * * and did not recover." Remand Determination at 33–34. The Commission further found that price declines in the U.S. market "outpaced" cost savings for the majority of the domestic industry not benefitting "extensively" from the purchase of Japanese imports. *Id.* at 34. The Commission also noted that "[t]he most significant decline in billet and bar prices appear to have taken place in 1997," and that "[w]hile redraw hollow prices declined throughout most of the period examined, we find that this reflects in large part the increasing vol-

---

[20] The Japanese Producers assert that the Commission ignored testimony producers of non-subject imports were in fact price leaders rather than Japanese producers. They further assert that the Commission's reliance on the Staff Report's finding that "Japanese pricing is generally lower than domestic pricing" omits that the Staff Report also indicated that "[s]ome of the purchasers that discuss Japanese pricing are quick to note that non-subject pricing is generally lower than domestic pricing, and is competitive or more competitive than Japanese." Staff Report at II–28 & n.52. The fact that some purchasers consider certain producers of non-subject imports to be price leaders or consider non-subject pricing generally lower than domestic pricing does not negate the Commission's analysis of the data showing consistently lower valued Japanese CSSSHP, nor does it negate the fact that several Japanese producers were also named as price leaders.

ume and share, and declining average unit values, of imports of the subject merchandise from Japan." *Id.* at n.28.[21]

The Japanese Producers first claim there is a continuing input cost/price relationship throughout 1999 for input (bar) costs.[22] The Japanese Producers also claim that the Commission ignored evidence that: (1) factoring in lag times, the pricing data generally show a close correlation between domestic prices, prices for feedstock (bars), and raw material prices; (2) questionnaire responses "confirm" that raw material and feedstock prices are the predominant cause for changes in domestic prices; and (3) Sandvik documents indicate that its prices declined due to lower nickel and alloy prices.

First, the Commission noted a lack of correlation between domestic pricing and the cost of nickel, rather than feedstock (bars). Second, the Commission did not find that declining input costs had *no* effect on domestic pricing. Rather, the Commission found that the price declines were greater than any cost savings, and therefore subject imports could not be ruled out as a material factor of declining domestic prices. The Japanese Producers do not dispute the Commission's finding with respect to the extent of pricing declines in relation to cost savings. In the absence of any evidence proffered by the Japanese Producers that price declines did not in fact outpace cost savings from declining input prices, the court finds that the Commission's properly ruled out declining input costs as a predominant cause of injury.

III. Impact: Correlation between subject import volumes and the performance of the domestic industry

The court in *Altx I* directed the original Commission majority to re-evaluate its finding of a lack of a correlation between the domestic industry's performance with trends in subject import volume. 167 F. Supp. 2d at 1358.[23] On remand, the new Commission majority recognized various trends that were inconsistent with a finding that subject import volume correlated with domestic performance, but discounted each inconsistency based on other financial indicators. First, the Commission found that domestic production rose between 1997 and 1998, fell in 1999, then recovered in the first quarter of 2000. Remand Determination at 35. As subject import volume increased from 1997 to 1998 and dropped in 1999, the Commission explained this apparent inconsistency by attributing the increase in production level to the "combined effects of increased exports and inventory levels." *Id.* Second, the Commission recognized that "full fiscal year gross profits and operating income

---

[21] The Commission also found that "the domestic industry's superior delivery times do not offset other advantages generally attributed by purchasers to CSSSHP from Japan (primarily price, followed by product range)." Remand Determination at 34 (citing Staff Report at Tables II–2 and II–3). The Japanese Producers do not contest this finding.

[22] Specifically, the Japanese Producers assert that [ ] correspond to "little rise" in domestic prices after 1998, which contradicts the Commission's finding that domestic prices "did not recover" at the end of the POI although input prices increased in 1999. Remand Determination at 34.

[23] Specifically, the court ordered the Commission to respond to Plaintiffs' arguments that: (1) the domestic industry's strong performance was attributable to [ ] by domestic producers; (2) that the effect of subject import purchases would not be realized until the following year because in a market with shrinking consumption, merchandise is consumed more slowly as stocks last longer; and (3) the Commission ignored the results of its own econometric analysis, which showed that subject imports resulted in reduced output by the domestic industry. *Id.*

crested in 1998," but attributed this to declining costs (raw material direct labor, and factory overhead) and expenses over the POI. *Id.* at 36. Third, the Commission recognized that operating income on a unit basis and as a ratio to sales were higher in 1999 than in 1997, but found that this increase "reflect[s] the increasing proportion of total sales accounted for by the higher-value cold-finished stainless steel hollow products." *Id.* at n.41. That is, the Commission apparently discounted the spike in the domestic industry's overall operating income in 1998 on the basis that the consistently rising operating income attributable to cold-finished CSSSHP outstripped that of hot-finished CSSSHP.

The Commission then analyzed net changes from 1997 to 1999 in domestic performance indicators, including production, capacity utilization, and domestic shipments.[24] Finally, the Commission considered domestic performance in relation to subject import volume on a semi-annual basis for 1998 and the first half of 1999.

The Japanese Producers contest the new Commission majority's impact determination on the following grounds: (1) the Commission erred in relying on semi-annual data; (2) there is no correlation between the volume of subject imports and the condition of the domestic industry, for either the semi-annual or the annual data. The Japanese Producers also claim that the Commission ignored the effect of the bankruptcy of AL-Tech on industry performance, as well as the benefits of subject imports to the domestic industry and the impact of related party transactions.

A. Use of Semi-Annual Data

After analyzing the domestic industry's performance for the period 1997–1999, the Commission stated that "a more detailed performance evaluation indicates that the domestic industry's difficulties were most intense in the second half of 1998 and the first half of 1999, when the subject imports held a [substantial percentage] of the U.S. market."[25] *Id.* at 37. The Commission recognized that in the first half of 1998 domestic operating performance was "strong" even though the volume of subject imports was high. *Id.* Nevertheless, this apparent inconsistency was attributed to a "steep decline in the unit cost of goods sold ['COGS']." *Id.* The Commission also found that domestic performance in the last half of 1998 declined in terms of domestic shipments and profitability, while subject imports "surged" 33.3 percent. *Id.* The Commission recognized that subject imports decreased from the second half of 1998 to the first half of 1999, but found that this was not inconsistent with declines in U.S. producers' domestic shipments, revenue and prof-

---

[24] The Commission determined that U.S. performance declined according to several indicators during this period. For example, the Commission states that over this time period, production fell by 11.4 percent, capacity utilization decreased by 3.9 percentage points, and domestic shipments decreased by 16.8 percent by quantity (19.6 percent by value). Remand Determination at 36 (citing Staff Report at Table III–2). The Commission noted that the decline in domestic shipments occurred while U.S. consumption increased by 10.9 percent and subject imports increased by 26.8 percent. *Id.*

[25] For support of its characterization of the domestic industry's difficulties as "intense," the Commission cites to hearing testimony from a former ALTech employee attributing the financial difficulties The Commission also cites to bi-annual data in Table C–6 of the Staff Report, which show that the market share of Japanese imports were as follows: 29.5% first half of 1998; 40.2 % in the second half of 1998; 30.7% in the first half of 1999; and 22.9% in the second half of 1999.

itability because subject imports "remained at high levels." *Id.* at 38. Lastly, the Commission noted a decrease in subject imports from the first half of 1999 to the second half of 1999, which coincided with an improvement in the domestic industry's performance (in terms of domestic shipments and operating income) that continued into the first quarter of 2000. *Id.* at n.53.

The Japanese Producers claim that the Commission's method of analyzing the data on a semi-annual basis for 1998 and the first half of 1999 is contrary to law because in order to comply with its obligation to investigate present injury, the Commission must look at trends in the U.S. industry performance and imports over the entire three year plus partial year period for which data are available. The Japanese Producers focus particularly on the last half of 1999, which they argue shows that any injury by subject imports "disappeared" and therefore the Commission would be obligated to find no injury as a matter of law. The Japanese Producers further assert that, as the Commission sought other injury-related data (for example, data related to competitive overlap) only on a calendar year basis, the data it did collect for the period July 1, 1998 to June 30, 1999 are too limited to rely upon in making an overall injury determination.

It is apparent, however, that the Commission sought to address the inconsistencies suggested by its analysis of the 1997–1999 data by analyzing semi-annual data. The Commission was under no obligation to perform this supplementary analysis for the entire POI. *See Companhia Paulista de Ferro-Ligas v. United States,* 20 CIT 473, 483 (1996) (Commission may weigh evidence from different time periods and determine which is more probative) (citation omitted). Although the Commission is under an obligation to respond to a party's reasonable arguments regarding apparent inconsistencies in the data and the conclusions drawn therefrom, the Commission is not under an obligation to retract from a more detailed analysis to shoehorn the data into groupings that comport with a differing interpretation of the data.

The Japanese Producers further argue that the Commission fails to account for the fact that semi-annual data for three U.S. producers operations are incomplete. The original Commission majority had discounted the semi-annual data as not comparable to the annual data due to the absence of semi-annual data from three domestic producers. *See Altx I,* 167 F. Supp. 2d at 1371. The court in *Altx I* specifically rejected its proffered reason on the ground that the three producers that did not provide semi-annual data represented a relatively small portion of the domestic production for 1999. *Id.*

The court finds, therefore, that the Commission did not err in relying on semi-annual data to supplement its analysis of domestic performance in relation to subject import volume.

B. Support for the Commission's Positive Correlation Finding

The Japanese Producers claim that the Commission ignored the following trends that undermine the Commission's determination that

subject import volume is significant, and otherwise belie a correlation between injury and subject imports: (1) from 1997 to 1998, the domestic industry's performance (in terms of production, profit, cash flow, productivity, and wage rates) improved notwithstanding a rise in imports; and (2) in 1999, the domestic industry returned to 1997 levels, while imports decreased. The Commission responds that "neither gross profit nor operating income was strong throughout the POI," as "full fiscal year gross profit and operating income crested in 1998, but were lower in 1999 than in 1997." ITC Br. at 32. Thus, the Commission's argument relies on the net decrease in gross profit and operating income over the POI to show an industry in decline.

That the Commission may rely on semi-annual data for a select period as part of its impact analysis is not to say that the Commission may disregard trends over the entire POI, or that its conclusions drawn from the semi-annual data are necessarily supported by substantial evidence. Because a correlation analysis necessarily entails a tracking of trends in subject import volume in relation to trends in the domestic industry's performance, the Commission should not rely solely on the *net change* in subject import volume performance indicators over the POI when year-to-year data is available. This is especially true in this case, where 1998 showed dramatic fluctuations in subject import volume and in several of the domestic industry's performance indicators.[26]

In this case, the Commission did evaluate domestic production, gross profits and operating income on a year-to-year basis. The Commission did not evaluate any other of the "relevant economic factors" on such a basis. *See* 19 U.S.C. § 1677 (the Commission "shall evaluate all relevant economic factors which have a bearing on the state of the industry," including the following: output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development). Nevertheless, remand is not necessary on this issue because the Japanese Producers have not attempted to refute the Commission's explanations for the apparent inconsistencies in the data it *did* analyze on an annual basis.

---

[26] The Staff Report indicates that market activity in 1998 substantially deviated from that in 1997 and 1999. (Quantities are expressed in short tons, while values are expressed in 1,000 dollars.).

[ ]

Staff Report at C–4.

C. The Effect of ALTech's Bankruptcy on Domestic Performance Indicators

The Japanese Producers claim the Commission ignored the effects of the bankruptcy of ALTech on the industry.[27] Specifically, the Japanese Producers assert that the ALTech bankruptcy: (1) tempered the operating results of the domestic industry; (2) explains the net decline in U.S. industry production levels from 1997 to 1999; (3) resulted in the bulk of production jobs lost over the POI. The Japanese Producers contend that the decline in ALTech's operations had a material impact on the aggregate injury data.[28] The Japanese Producers contend that the 1997–1998 rise in redraw hollows can in part be attributed to ALTech's bankruptcy. The Japanese Producers allege that when the effects of the ALTech bankruptcy are removed from the analysis, domestic CSSSHP production actually rises, albeit slightly, between 1997 and 1999.] Sumitomo Post-Hearing Br. at 3.

The Commission maintains that it was not obligated to adjust the data to account for the bankruptcy of ALTech because it must evaluate the domestic industry "as a whole," and, in any event, the ALTech bankruptcy was caused in part by Japanese imports. It is true that the Commission must evaluate the domestic industry as a whole. *See Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1063–64 (1995). Evaluating the domestic industry "as a whole," however, is not a license to ignore information that would give context and meaning to the data it is analyzing in assessing the domestic industry's performance. Indeed, the statutory directive to analyze the industry "as a whole" compels an evaluation of all material factors raised by the parties that would render a more accurate reading of the health of the industry. Therefore, if the Commission determines to discount a particular factor that bears on the relevant financial indicators, it must give substantial evidence to support its reasoning. The court finds that the Commission has failed to do so.

The Commission indicates that the Remand Determination cited testimony by a former ALTech employee that "ALTech began losing significant accounts to subject imports and was eventually forced to cease production." Remand Determination at 37 n.43 (citing Hearing Tr. at 26 (Mr. Peak)). The Commission points to no other facts on the record that would support Mr. Peak's perception of the cause of ALTech's financial troubles, and fails to address evidence that may contradict it, e.g., the ongoing disputes with labor. Citation to testimony reflecting the opinion of a former employee, without more, does not constitute an *analysis* of

---

[27] The Japanese Producers describe the chronology of events related to the bankruptcy of ALTech as follows: (1) ALTech was purchased in 1994 by Sammi Steel of Korea; (2) Sammi Steel declared bankruptcy in 1997, followed by a Sammi affiliate, Atlas Steel, which supplied ALTech with its billet; (3) in 1997, ALTech's workforce staged a strike and Atlas Steel sued ALTech for $41 million in unpaid bills; (4) by the end of 1997, ALTech declared bankruptcy, but continued operations, [ ]; (5) in 1999, ALTech's assets and manufacturing facility were bought by Tubacex, the parent company of Salem, a producer of cold-finished CSSSHP; (6) operations resumed as ALTX, Inc., one of the plaintiffs in the present action. ALTech was the only domestic producer to produce both hot- and cold-finished product during the POI. Staff Report at I–10 & n.14. Plaintiffs stress that ALTech was in operation during its bankruptcy, producing and selling "significant quantities of CSSSHP during 1998." Def. Int. Br. at 9 (citing Staff Report at III–4, 5; Table III–2).

[28] The Japanese Producers specify that [ ].

whether the ALTech bankruptcy was in fact caused by subject imports, much less an adequate treatment of the Japanese Producers' contentions regarding its effect on performance indicators. Therefore, the Commission shall reevaluate its determination as to the impact of subject imports on the domestic industry by taking into consideration the effects of the bankruptcy of ALTech.

IV. Alternative Causation: Non-Subject Imports

The court in *Taiwan Semiconductor,* 59 F. Supp. 2d at 1329–31, held that "the Commission must not attribute the harmful effects from other sources of injury to the subject imports and must adequately explain how it ensured not doing so." *See also* SAA at 851–52 (Commission must "ensure that it is not attributing injury from other sources to the subject imports."). In *Altx I,* the court explained that the Commission need not establish a causal link between an alternative source of injury, such as non-subject imports, and the impact on the domestic industry. Nevertheless, the court cautioned that "a positive correlation concerning non-subject import volumes, in conjunction with other factors, may be sufficient to cut the causal link between subject imports and any harm suffered by the domestic industry." *Altx I,* 167 F. Supp. 2d at 1361–63. The court indicated that the original Commission majority provided sufficient proof to support its conclusion that non-subject imports displaced both subject imports and the domestic like product for the period 1998–1999. The court found, however, that the original majority failed to consider that its reasoning as applied to 1997–1998 would lead to an opposite conclusion, namely, that subject imports displaced both non-subject imports and the domestic like product. Consequently, the court instructed the Commission to reevaluate its assessment of displacement by non-subject imports in light of data for the *entire* POI.

On remand, the new Commission majority discounted the significance of non-subject imports on the following grounds: (1) the increase in the volume of imports of the subject merchandise from Japan was more rapid than that of non-subject imports; (2) the average unit values per short ton of non-subject CSSSHP remained "substantially higher" than those of the hot-finished and cold-finished CSSSHP from Japan; and (3) "[A] large volume of the non-subject imports do not appear to compete directly with U.S. production." Remand Determination at 38 n.54 (citing Staff Report at Table IV–4; Table III–5 and Table E–4).[29] The Japanese Producers claim that the Commission either mischaracterizes or ignores the importance of non-subject imports in terms of volume, price effects, and impact on the domestic industry.

---

[29] The Commission asserts that it analyzed the importance of non-subject imports by citing the following data: (1) subject imports increased by 26.8 percent from 1997–99, while non-subject imports increased by 23.8 percent during that time; (2) non-subject imports held [ ] percent of the market, [ ] percent in 1998, and [ ] percent in 1999; (3) non-subject market share increased by 4.9 percentage points over the period, and was 18.8 percentage points higher in the first quarter of 2000 as compared to the first quarter of 1999; (4) the market share of subject imports increased by 13.5 percentage points from 1997–1998, then retreated by 10.1 percentage points in 1999, such that there was a gain of 3.4 percentage points over the period examined, and was 21.1 percentage points lower in the first quarter of 2000 than in the first quarter of 1999.

A. Volume

The Japanese Producers contend that the Commission ignored its argument that the higher aggregate volume of non-subject imports, and specifically the 1998–1999 "jump" in non-subject imports while the domestic industry was "weakening," point to a causal relationship between injury and non-subject imports sufficient to cut the causal link between subject imports and injury to the domestic industry. The court finds that the Commission's reliance on the comparative rate of increase in volume is insufficient to discount the role of non-subject imports for the purpose of analyzing present material injury determination.

Although there is nothing to prohibit the rate of increase (i.e., acceleration) in volume from being a *factor* in its analysis, the comparative rate of increase in volume by itself is not a reliable indicator of whether non-subject imports "may have such a predominant effect in producing the harm as to * * * prevent the [subject] imports from being a material factor." *Nippon* at 479 (citing *Taiwan Semiconductor,* 59 F. Supp. 2d at 1329). Surely, the Commission would not be barred from finding subject import volume significant simply because volume levels were *decelerating,* or not accelerating as fast as domestic shipments or non-subject imports. To the extent the Commission considers the non-subject imports' slower rate of increase to negate the acknowledged fact that non-subject imports occupied a higher market share than subject imports at all times during the POI, and captured a larger portion of the domestic industry's market share, the court rejects such flawed reasoning. *See* Staff Report at C–4. Nor is it clear why subject import's faster rate of increase eclipses the larger *absolute* increase by non-subject imports. It may be that the increase in non-subject import volume is less significant than that of subject imports if non-subject volume increases were primarily in product types that the U.S. industry either does not produce to any significant extent, but the Commission is silent on the issue of tracking subject and non-subject import volume in terms of areas of no, or at least no viable, domestic competition.

The Japanese Producers also maintain that the data relied upon by the Commission in fact shows that imports from Japan are a substitute for non-subject imports, rather than U.S. production, and contradicts the Commission's characterization of "limited competition" between non-subject imports and domestic production.[30] The court finds an apparent inconsistency in the Commission's assessment of domestic like product competition with subject imports and with non-subject imports.

---

[30] The court notes that for hot-finished CSSSHP, the product types in which the domestic industry production is concentrated generally correlate to those product types in which both Japanese and non-subject imports are also concentrated. The court notes a similar concentration for cold-finished CSSSHP. Table E–4 shows that the hot-finished products in which domestic industry concentrates production include: [ ], both of which are also produced by Japan and other sources, [ ]. The domestic industry also produces cold-finished CSSSHP in the following categories: [ ], some of which are produced in larger quantities by Japan and others from third-country sources.

In addition, Table I–1 shows that domestic and Japanese production is mainly in the >1¼" and < 3" size range, and CSSSHP from all other sources is concentrated in the >3" range. The reliability of this data is questionable, however, as it does not reflect the size breakdown of the market described in section I and reflecting the domestic industry's lack of viability in sizes between 3" and 8". Arranged by product type, however, the data show that Japanese and nonsubject imports appear to compete more directly with each other than with the domestic industry: both concentrate production in A312 pipe, while domestic production is concentrated in redraw hollows.

The Commission claims that its finding that "[a] large volume of the non-subject imports do not appear to compete directly with U.S. production" is supported by Table E–4 which shows that "there are 23 categories in which there were non-subject imports shipped to the United States in 1999, but little or no domestic production, comprising [ ] short tons, or [ ], of all non-subject CSSSHP that was shipped in that year," which it considered to be a "substantial volume" of non-subject imports that did not compete directly with the domestic like product. ITC Br. at 34. The court recognizes that it is within the agency's discretion to assess the substantiality of the percentage of non-subject import volume not competing with the domestic product. Nevertheless, it is not clear why a similar percentage (approximately 20%) of subject imports not produced by the domestic industry supported the opposite conclusion in determining the significance of subject import volume.[31] The Commission shall address this inconsistency on remand.

In further support of its conclusion, the Commission at oral argument directed the court's attention to the section of Table I–1 of the Staff Report ("U.S. shipments of domestically produced and imported products, by sizes and types) that shows U.S. shipments of hot-finished CSSSHP arranged by size. This section of Table I–1 shows that both U.S. and Japanese production of hot-finished CSSSHP is concentrated in the 1¼″ to 3″ O.D. range, while non-subject imports are concentrated in the 3″ and higher range.[32] Although the size ranges do not match the size ranges discussed above in terms of the viability of domestic production, *see* section I.B *supra,* this proportionality generally supports the Commission's conclusion that non-subject imports compete less directly with U.S. producers than do subject imports. The court notes, however, that to the extent conclusions about competition overall may be drawn from the proportionality in U.S. shipments of hot-finished CSSSHP alone, the figures for hot-finished CSSSHP disaggregated by *type* apparently support the opposite conclusion.[33] Nor do the figures for *total* CSSSHP show a proportionality similar to that of hot-finished CSSSHP arranged by size, which may or may not be accounted for by the large percentage of unreported subject imports of cold-finished CSSSHP disaggregated

---

[31] Table I–2 of the Staff Report indicates the range of imports not available from U.S. producers expressed as a percentage of total imports. These figures are as follows:

	Japan			Other Sources		
	1997	1998	1999	1997	1998	1999
Hot	18.3	24.8	25.3	24.9	14.3	21.0
Cold	2.8	6.9	7.8	0.7	1.0	0.6
Total CSSSHP	11.0	19.0	18.7	16.2	9.0	13.8

[32] Specifically, Table I–1 shows that [ ] of U.S. produced hot-finished CSSSHP is in the 1¼" to 3" O.D. range, and [ ] of Japanese hot-finished CSSSHP, in contrast to [ ] of non-subject imports.

[33] Staff Report at Table I–1 show that U.S. shipments of hot-finished CSSSHP are concentrated in the redraw hollows—[ ] of U.S. production—in comparison to [ ] and [ ] for subject imports and non-subject imports, respectively. In contrast, subject and non-subject imports are concentrated primarily in A–312 pipe—[ ] respectively and [ ], respectively, in comparison to [ ] of U.S. production.

by size-range.[34] Therefore, the court finds the data in Table I–1 facially too mixed to serve independently as a basis for discerning the Commission's reasoning for the CSSSHP market overall. On remand, the Commission may choose to explain to the court how Table I–1 supports its conclusion that non-subject imports do not compete directly with domestic production.

B. Price

The Japanese Producers maintain that the average unit values for all imports are misleading as a means to discount the importance of non-subject imports because the average values of subject and non-subject imports "are not comparable because of differences in product mix." The Japanese Producers' argument lacks merit. The Commission may rely on a comparison of average unit values to determine whether non-subject imports can be discounted as the predominant cause of injury, although such a comparison would be questionable at best if applied to a determination of the subject imports' price effects on the domestic industry under 19 U.S.C. § 1677(7)(C). The court finds that the Commission is correct that Table IV–4 supports its finding that subject imports are lower-valued than non-subject imports, as Table IV–4 shows that in every year of the POI, the Japanese Producers show consistently lower aggregate unit values for both hot- and cold-finished CSSSHP. Table E arranges imports by product group, and shows that subject imports' unit values are indeed lower than that of non-subject imports in a majority of product-group comparisons of Japanese and non-subject imports' AUVs. Therefore, the Commission's isolated finding that Japanese pricing was lower than non-subject imports is supported by substantial evidence.

C. Impact

Lastly, the Commission has not addressed the Japanese Producers' argument that the volume of non-subject imports correlates more closely with the performance of the domestic industry that the volume of subject imports. A close correlation between non-subject import volume and the performance of the domestic industry could support a determination that non-subject imports were a predominant factor in causing injury to the domestic injury, especially if the correlation with subject imports is not as clear. The Commission shall make such an evaluation on remand in a manner that avoids the problems discussed above.

CONCLUSION

Accordingly, the court remands for the Commission to reevaluate subject import volume in terms of its findings of a limited competitive over-

---

[34] Staff Report at Table I–1 shows that U.S. shipments of total CSSSHP are concentrated in the 1¼" to 3" range—[ ] of U.S. production—in comparison to [ ] and [ ] for subject imports and non-subject imports, respectively. In contrast, non-subject imports are concentrated primarily in size ranges above 3"—[ ], while [ ] of subject imports are in this category, respectively, in comparison to [ ] of U.S. production. The proportionality with respect to subject imports may not be conclusive, however, because [ ] of subject imports of all CSSSHP were not reported in terms of size range, reflecting the high percentage—[ ]—of subject imports of cold-finished CSSSHP that were not reported.

lap, especially in light of its findings of attenuated competition with non-subject imports. The Commission shall also reevaluate its conclusions with respect to: (1) correlation between underselling and domestic industry performance; (2) correlation between subject import prices and domestic prices; (3) the effect of the bankruptcy of ALTech on domestic performance indicators; and (4) non-subject import volume and correlation thereof with domestic performance.

Remand results are due within 45 days hereof. Objections may be filed within 15 days and the response within 11 days thereafter.

(Slip Op. 02–66)

ALTX, INC., AMERICAN EXTRUDED PRODUCTS, CORP, DMV STAINLESS USA, INC., SALEM TUBE, INC., SANDVIK STEEL CO., PENNSYLVANIA EXTRUDED TUBE CO., AND UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, PLAINTIFFS *v.* UNITED STATES, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND SUMITOMO METAL INDUSTRIES, NIPPON STEEL CORP, KAWASAKI STEEL CORP., NKK CORP, KOBE STEEL LTD., AND SANYO SPECIAL STEEL CO., DEFENDANT-INTERVENORS

Court No. 00–09–00477

[Motion for preliminary injunction denied.]

(Dated July 12, 2002)

Collier Shannon Scott, PLLC (David A. Hartquist, Jeffrey S. Beckington, and *R. Alan Luberda)* for plaintiffs.

Lyn M. Schlitt, General Counsel, *Marc A. Bernstein,* Assistant General Counsel, United States International Trade Commission *(Rhonda M. Hughes),* for defendants.

Wilmer, Cutler & Pickering (John D. Greenwald, Robert C. Cassidy, Jr., Leonard Shambon, Jason Kearns and *Lynn M. Fischer)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* Plaintiffs Altx, Inc., American Extruded Products Corp., DMV Stainless USA, Inc., Salem Tube, Inc., Sandvik Steel Co., Pennsylvania Extruded Tube Company, and United Steelworkers of America, AFL-CIO/CLC (collectively, "Altx") move this court for the entry of a preliminary injunction that: (1) enjoins the U.S. Customs Service ("Customs") from liquidating entries of circular seamless stainless steel hollow products ("CSSSHP") from Japan which have been entered or withdrawn from warehouse on or after May 1, 2000—the date of the preliminary determination of sales at less than fair value, *see Circular Seamless Stainless Steel Hollow Products from Japan,* 65 Fed. Reg. 25,305 (May 1, 2000)—and that remain unliquidated as of the date of the court's issuance of the requested injunction; and (2) orders the Department of Commerce ("Commerce" or "the Department") to issue instruc-

tions to Customs suspending liquidation on all such entries or withdrawals from warehouse, pending the final resolution of this action and any appeals thereto. *See* CIT Rule 65.

BACKGROUND

On August 30, 2000, the United States International Trade Commission ("ITC" or "the Commission") published its final determination by a 4–2 vote that the domestic CSSSHP industry was neither materially injured nor threatened with material injury by reason of dumped imports of CSSSHP from Japan. *See Circular Seamless Stainless Steel Hollow Products from Japan,* 65 Fed. Reg. 52,784 (Aug 30, 2000). Accordingly, Customs ceased collecting duty deposits on entries of CSSSHP from Japan and refunded all deposits that had been collected between the date of publication of Commerce's preliminary determination *(i.e.,* May 1, 2000) and the publication of the Commission's final determination.

On September 19, 2001, the court remanded the determination to the Commission to reconsider its findings with respect to the volume of imports, the effect of subject imports on domestic prices, and impact of imports on the domestic industry, and to reevaluate its determinations regarding present material injury and threat of material injury. *See Altx, Inc. v. United States,* 167 F. Supp. 2d 1353 (Ct. Int'l Trade 2001). On December 3, 2001, the Commission returned a remand determination reflecting a 3–3 affirmative determination based on the original minority opinion.

DISCUSSION

Pursuant to 19 U.S.C. § 1516a(c)(2), the court has the authority to render preliminary injunctive relief "upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances." A preliminary injunction, however, is an extraordinary remedy which may issue only upon a clear showing by the moving party that they are entitled to such relief. *See Trent Tube Div., Crucible Materials Corp. v. United States,* 744 F. Supp. 1177 (1990). "Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined. A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great." *S. J. Stile Assocs. v. Snyder,* 646 F.2d 522, 525 (1981) (citation omitted). Plaintiffs must establish the following four factors in order to obtain a preliminary injunction: (1) the threat of immediate irreparable harm; (2) the likelihood of success on the merits; (3) the public interest would be better served by the requested relief; and (4) the balance of hardship on all the parties favors plaintiffs. *See Zenith Radio Corp. v. United States,* 710 F.2d 806, 809 (Fed. Cir. 1983).

A. The ITC's Affirmative Decision does not Establish Irreparable Harm

Altx relies on *Zenith* for the proposition that because, following initial remand, the Commission has rendered an affirmative determination of injury under the antidumping laws, the court must find irreparable

harm to the domestic industry. Altx's reliance on *Zenith* is misplaced. The Federal Circuit in *Zenith* held that during an appeal of an administrative review of an antidumping order, liquidation of entries constituted irreparable harm. The Federal Circuit reasoned that liquidation of entries was of particular concern in the case of an administrative review because liquidation under such circumstances "would eliminate the only remedy available to [the petitioner] for an incorrect review determination." *Zenith,* 710 F.2d at 810. Clearly, *Zenith* does not apply here because the instant case involves an appeal of injury determination in an investigation, rather than an administrative review. *See also Sandoz Chemicals Corp. v. United States,* 17 CIT 1061, 1063 (1993) ("Unlike an annual review, a negative injury determination affects liquidation of all future entries, not just those made within a specific time period. In such a situation, liquidation does not substantially curtail available judicial remedies.").

Altx attempts to distinguish the holding in *Standoz* on the ground that it involved an appeal from a *negative* injury determination pursuant an investigation. In *Trent Tube,* however, the court extended the *Sandoz* holding to an investigation where, as here, the Commission had made an initial negative injury determination, and subsequently made an affirmative injury determination on remand. The court denied the motion for a preliminary injunction, reasoning that liquidation of entries is not *per se* irreparable harm in the context of determinations in investigations. *Trent Tube,* 744 F. Supp. at 1177 ("Plaintiffs must show additional evidence to prevail on the motion for preliminary injunction."). The court ultimately found that liquidated entries, supplemented by speculative evidence of harm, was insufficient to establish that denial of an injunction would cause irreparable harm. *Trent Tube,* 744 F. Supp. at 1179. Thus, to support a finding of irreparable harm, Altx must present additional evidence establishing irreparable injury.

B. Evidence of Lost CDO Revenue does not Establish Irreparable Harm

Altx argues that the loss of duty revenue under the Continued Dumping and Subsidy Offset Act ("CDO") constitutes irreparable harm. *See* 19 U.S.C. 1675c (2001); 19 C.F.R. § 159.61. Under the CDO, assessed duties received by Customs during the fiscal year will be disbursed to affected domestic producers that have incurred qualifying expenditures subsequent to the issuance of an antidumping or countervailing duty order. *See* 19 C.F.R.§ 159.61(a). Under the CDO, all duties collected by Customs are placed in a Special Account to be distributed to "affected producers" with "qualifying expenditures." *Id.* at § 159.64(b). If the Special Account figure is larger than the qualifying expenditures, the domestic producers will be paid for their full claim of qualified expenditures. *Id.* at § 159.61(c). If the Special Accout is less than the qualified expenditures, however, the domestic industries will be paid on a *pro rata* basis. *Id.*

Thus, in order to establish irreparable injury, Altx has the burden of showing that the affected producers' qualified expenditures will be

greater than the amount that will be distributed from the Special Account. Altx has not met this burden. First, Exhibit 1 ("Continued Dumping and Subsidy Offset") indicates that Sandvik Steel incurred qualifying expenditures of $14,790,198 in calendar year 2001 against which domestic industry might claim disbursement under the CDO. Qualifying expenditures, however, "must be incurred after the issuance, and prior to the termination, of the antidumping duty order * * *." 19 C.F.R. 159.61(c). Altx fails to show that evidence of qualifying expenditures for the year 2001 will correspond to qualifying expenditures *following* the antidumping order. Furthermore, in Attachment 8 ("U.S. Imports of Circular Seamless Stainless Steel Hollow Products from Japan"), Altx provides evidence of volume and value of imports for the period from August 2001 to February 2002. This serves merely as an indicator of revenues that Customs could collect for the Special Account if there was a suspension of liquidated entries. This does *not* indicate the portion of that revenue the affected producers would receive. At a minimum, Altx must produce affidavits or other evidence showing, with more specificity, expected lost antidumping duties on liquidated entries, the amount of antidumping duties to be raised in the event of the issuance of an antidumping duty order, and the amount of qualified expenditures to be expected following an order. Further, because the effects of any order will continue in the future, Altx must establish that there is a likelihood that it will suffer economically because of the liquidation of particular entries. Without such specific showings, it is left to speculation whether liquidating entries will have any impact on the domestic industry.

Although the court has not sustained the remand affirmative injury finding, but has again remanded the case, because Altx failed to meet the burden of proving irreparable harm, the court need not reach its arguments with respect to the other three factors assessed in determining whether to grant an preliminary injunction. *See Trent Tube,* 744 F. Supp. 1177 ("If any one of the requisite factors has not been established by plaintiffs, the motion for a preliminary injunction must be denied."). The court notes, however, that it cannot predict at this time whether the final remand injury determination will be affirmative or negative. Thus, further attempts to show irreparable harm are unlikely to satisfy Altx's overall burden under the four-part test.

Accordingly, Altx's motion for a preliminary injunction is DENIED.

Index

Customs Bulletin and Decisions
Vol. 36, No. 31, July 31, 2002

U.S. Customs Service

Treasury Decisions

General Notices

CUSTOMS RULINGS LETTERS AND TREATMENT

U.S. Court of International Trade

Slip Opinions

Federal Recycling Program
Printed on Recycled Paper

U.S. G.P.O. 2002–491–793–40069